

FEDERAL TORT CLAIMS ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON AGENCY ADMINISTRATION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 1775

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE TO PROVIDE FOR AN EXCLUSIVE REMEDY AGAINST THE UNITED STATES IN SUITS BASED UPON ACTS OR OMISSIONS OF UNITED STATES EMPLOYEES, TO PROVIDE A REMEDY AGAINST THE UNITED STATES WITH RESPECT TO CONSTITUTIONAL TORTS, AND FOR OTHER PURPOSES

MARCH 31, 1982

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FEDERAL TORT CLAIMS ACT

WEDNESDAY, MARCH 31, 1982

U.S. SENATE,
SUBCOMMITTEE ON AGENCY ADMINISTRATION,
COMMITTEE ON JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 5110, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman) presiding.

Staff present: John Maxwell, chief counsel; Lynda Nersesian, counsel; Russell Pallesen, professional staff; and Susi Shirk, chief clerk.

OPENING STATEMENT OF SENATOR GRASSLEY

Senator GRASSLEY. I call the hearing to order.

We are here today to consider S. 1775, legislation amending the Federal Tort Claims Act. This hearing is the third one that the subcommittee has held on this bill.

In brief, since the 1971 Supreme Court decision of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* there has been an exponential increase in the number of lawsuits which attempt to seek redress directly from the individual defendant's personal resources rather than from the Government. Because of well-founded concepts of sovereign immunity, the United States is not amenable to *Bivens* suits, which are also known as constitutional tort actions. The primary characteristic of these suits is that they allege a personal cause of action in tort damages arising directly out of a provision of the Constitution such as the fourth or fifth amendment.

Although they originally involved just law enforcement activities, these actions increasingly have arisen out of regulatory or personnel actions taken by Federal officials. The *Bivens* action is expensive, exhaustive, and unlikely to result in a collectible judgment. The fact that only 14 of the thousands of actions filed have resulted in money judgments against Federal employees demonstrates the futility of bringing these suits. Even if successful, the plaintiff has difficulty proving substantial actual damages from the violation of a constitutional right, and if damages can be proven, Government employees ordinarily would be unable to pay. Often compensation most eludes those who have been most wronged.

S. 1775, does much to alleviate the problems outlined in previous hearings. This legislation would remove the unfair burden of personal financial ruin from the shoulders of Government employees by making the Federal Government the exclusive defendant in constitutional tort actions as well as those common law tort actions

not excepted in 28 U.S.C. 2680. This waiver of sovereign immunity by the Federal Government will ease the counterproductive effects that the threat of personal liability has had on vigorous decision-making.

In summary, I would emphasize that S. 1775 is in the best interests of all those concerned. It dispels that cloud of potential financial ruin that now hangs over our Federal public servants. It offers an attainable remedy to those whose constitutional rights have been violated by substituting a deep-pocket defendant. Also, it would resolve the problems faced by the Government in defending its employees. Finally, it would restore and cultivate effective and vigorous decisionmaking on the part of our Federal public servants. The employee, the citizen, the Government and the public are all beneficiaries of S. 1775.

We have a fine panel of witnesses to come before the committee today and we are going to start off with the Director of the Federal Bureau of Investigation.

We welcome you, Judge, and we appreciate hearing your testimony. As a matter of practice, we do include all the testimony in the record, so if you want to summarize, that would be OK.

STATEMENT OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Thank you very much, Mr. Chairman.

I welcome the opportunity to appear before this subcommittee today to once again lend my support to legislation which would amend the Federal Tort Claims Act. S. 1775 would provide for an exclusive remedy against the United States for constitutional torts and common law torts committed by Government employees acting within the scope of their employment.

In my view, removing an employee's fear of financial ruin for acts performed while carrying out official duties is essential to the morale of the men and women of the FBI. The effects of *Bivens* suits on the personal and professional lives of Government employees has been detailed by other witnesses before this subcommittee. Today, I would like to identify some of the more significant problems that the FBI has encountered in *Bivens* litigation, and also outline the Bureau's disciplinary system.

I consider the issue of providing representation to agents sued in their individual capacities a major problem. Although legal representation is supplied by the Government if an agent was working within the scope of his employment when the alleged tortious act was committed, the representation will be in jeopardy if a conflict of interest develops between the Government and the defendant agent. Private counsel may be provided in these instances but often this is contingent upon appropriations which have been depleted. Many times the conflict occurs well into the litigation and the task faced by the new attorney is overwhelming. In one particularly complex lawsuit, a conflict of interest developed 6 years into the suit and resulted in the defendant agents being faced with the choice of either permitting the Government to intervene and argue against the best interest of the agents, or obtaining private counsel at their own expense.

I would also add that the ability of Government lawyers to serve two masters, the United States and the individual agent, raises both ethical and moral concerns.

The current state of the law also causes concern regarding the protection of informants. When the United States is a party to a lawsuit—either a criminal prosecution or a civil suit under the Federal Tort Claims Act—the Government may respond to demands for disclosure of an informant's identity by asserting the informant privilege, dropping the prosecution, or making an offer of settlement. But in a *Bivens* action, these options are unavailable because the United States is not a party to the case. Inasmuch as there is no definitive authority for the United States to settle litigation against individual Federal defendants, or pay settlements made by employees, the special agent sued under *Bivens* is faced with a double-edged choice. He may pay a settlement out of his own pocket, or contest the case in court. The latter alternative could lead to the disclosure of an informant's identity and the resulting loss to society of the informant's services, as well as an increased cost to the Government due to the continued litigation.

Passage of S. 1775 would eliminate this dilemma by permitting the United States, as the party defendant, the flexibility to determine how best to proceed.

Mr. Chairman, it is natural that your deliberations on S. 1775 would raise questions about the accountability of Federal law enforcement agents. Some would argue that accountability can be insured only by providing an opportunity for a damages award against an offending agent. My experience as Director of the Federal Government's largest law enforcement agency refutes this. Of the over 600 FBI agents sued personally since the *Bivens* decision, only three judgments—against seven agents—have been returned. Two of these cases are now on appeal.

The significance of these figures is apparent. The costs and volume of litigation are not commensurate with the very few instances where judgment has been entered against agents. It is difficult to assess whether such an unlikely result has any impact in terms of accountability. In my opinion, a fair, consistent, internal disciplinary system can best insure accountability and appreciation for constitutional rights.

Under S. 1775, if a constitutional tort suit against the Government results in a judgment against the United States, or an award, compromise, or settlement paid by the United States, the Attorney General must forward the matter to the head of the department or agency which employed the individual for appropriate administrative investigation or disciplinary action. This morning, I would like to outline for you the disciplinary system currently in use at the FBI.

The FBI is highly selective of the men and women we hire. They are of good character and have established records of respect for the rule of the law. They receive 15 weeks of extensive training at the FBI Academy in Quantico, Va. This training explains in great detail what is expected of them and what is prohibited of them by law and our rules. I might say that the first thing they start with is a reading of the Constitution of the United States.

Agents receive this training before their assignment to a field investigative position. An agent's training does not cease upon graduation from the FBI Academy. Agents are selected for periodic in-service training throughout their entire careers and are exposed to constant retraining in their respective field offices. For example, our Legal Counsel Division is responsible for the supervision of a program that provides training in legal matters throughout the year. This training is given to every field agent and consists of a minimum of 16 hours' instruction during a calendar year.

Our employees operate under conditions of scrupulous discipline and clearly defined guidelines for conduct and investigations. Alleged improprieties or misconduct on the part of FBI employees are immediately referred to our Office of Professional Responsibility. That office conducts or directs an independent inquiry into the allegations closely coordinated with the Office of Professional Responsibility in the Department of Justice. These inquiries may be of a criminal or administrative nature, and may result in criminal and/or administrative action. The results of these investigations ultimately are referred to the Administrative Summary Unit of the Administrative Services Division at FBI Headquarters. This unit reviews the entire investigation and makes recommendations on all disciplinary matters in the FBI. We, unlike many other agencies, believe that a disciplinary system is most effective and most efficient when it is of a centralized nature. It has been for that reason that the FBI has historically retained the responsibility for administering the disciplinary system at FBI Headquarters. This centralized system enables the FBI to insure uniformity of disciplinary actions based upon precedent, policy and the past record of the employee involved.

The Administrative Summary Unit makes recommendations for administrative action to the Bureau's Personnel Officer, the Assistant Director of the Administrative Services Division, and to the Executive Assistant Director for Administration. In some instances it initiates recommendations for me personally, where the allegation involves Bureau executives, unresolved policy questions, or unusual circumstances.

Our system provides ample checks and balances to insure that investigations are properly conducted and that appropriate administrative action is taken based upon these investigations. The Office of Professional Responsibility at FBI Headquarters has, as one of its duties, the responsibility to monitor actions taken against our employees to insure equity and uniformity. In addition, I am kept personally advised of virtually every disciplinary action that is taken by the FBI on a monthly basis. The Administrative Services Division prepares for me a report on all disciplinary actions taken in the FBI. After my review of the report, it is forwarded to the Office of Professional Responsibility at the Department of Justice for its review. In addition, the Office of Professional Responsibility at FBI Headquarters keeps me advised of allegations of serious misconduct as they are received.

I might also add that as a matter of information to the field we promulgate to our employees a summary of significant disciplinary actions without identifying the individual or the location in order that the employees may sense the type of punishment or become

aware of the type of seriousness we attach to particular acts of misconduct.

Mr. Chairman, I am convinced that the FBI's disciplinary system is the best in the law enforcement community. Our ability to succeed in our mission depends upon whether we enjoy the cooperation of the public, and that, in turn, depends upon whether the conduct of FBI employees earns public confidence. The FBI is permitted by law to select its employees very carefully and to require them to observe high standards of professionalism and conduct. I can assure you that we take very seriously any allegation of misconduct or impropriety by an employee of the FBI; we have adequate safeguards and procedures to insure that these allegations are properly addressed.

I thank this subcommittee for allowing me to speak on a subject of great concern to the men and women of the FBI. I would be happy to answer any questions you have.

Senator GRASSLEY. Yes; I have a few questions and I would like to announce, not only for you, but for other witnesses today, that it is the usual procedure for members who cannot be here to request that you answer in writing members' questions. We would appreciate a timely response.

We hope that this bill will get attention so that we can move to markup in the subcommittee and the full committee shortly. This is a bill that I am very much interested in. The administration has a keen interest in it as well.

So if any of you receive questions from members that are not here, or even from me, we would appreciate your timely response.

My first question deals with the fact that the FBI employees are excepted by law from the competitive service and thus are not covered by most rules relating to the Civil Service positions.

What effect does this status have on the Bureau's internal disciplinary system?

Mr. WEBSTER. Well, the bottom line is that it permits us to act promptly and effectively to deal with allegations of misconduct when they are found to exist. I have outlined our disciplinary procedure to you. It is intended to be timely and not unduly protracted. We do have a small group within the Bureau, those who have veterans' preference rights, and they are entitled to go to the OPM system to appeal any action taken by the Bureau, provided it is done in a timely way and they, of course, have ultimate court rights on an arbitrary and capricious standard of review.

But this is a relatively small group, growing smaller. Most of our employees are in the excepted service and are accountable to our discipline in a timely way.

Senator GRASSLEY. In regard to veterans' preference and their right to appeal disciplinary action to the Merit System Protection Board, what has been your experience regarding the disposition of adverse action appeals to this Board?

Mr. WEBSTER. Well, I think we have pretty good luck with them. Our experience has been all right. We have had two instances in the past year or two where a ruling has been overturned. I think in both instances the basis was a substitution of their judgment for mine, and a lack of awareness of the high standards that we impose on our employees, and in both cases they modified and

minimized the punishment. It was not a question of our not giving enough. It was a question of their thinking we had given too much.

One was an agent engaged in very bizarre behavior in furtherance of a plan he claims he developed to physically assault a neighbor and my conclusion, based on the recommendations and reports and so forth, that came to me, was that he should be disciplined. That has been temporarily, at least, overturned in one of these hearings and is on appeal.

Another case involved an agent who spent significant amounts of time at home when he was charging himself out to work. He was not in fact performing and had made some false statements on records that led me to believe he should be dismissed from the Service. That, too, is on appeal following modified punishment.

Senator GRASSLEY. I think for the record, if you would give us a little more detail on that first case, I think it would be worth consideration by other members of the committee.

Mr. WEBSTER. Well, this involved an agent who was observed in a downtown department store dressed up as a woman and his explanation was that he was angry with his neighbor because of a family dispute that he had not been able to resolve and he had some kind of plan to accost that person dressed as a woman, engage in a fight and perhaps have the other person seen as being overcome by a woman.

This generally is the explanation. I found it, and our OPR and Administrative Services Division found it, an unacceptable explanation. The kind of behavior that reflected a lack of stability that we feel is essential if the FBI special agent is going to enjoy the trust and confidence of the public.

Senator GRASSLEY. Even considering those facts, the Merit Protection Board would not let you fire that individual?

Mr. WEBSTER. That is, the hearing examiner would not let us fire him. That is on appeal, however, to the Board and we are awaiting a result.

Senator GRASSLEY. Other than cases involving employees that are veterans, does any Federal agency routinely review disciplinary actions taken by your agency?

Mr. WEBSTER. Not routinely. Of course, agents and employees have the privilege of going to the courts if they claim some kind of constitutional—some discrimination based on race, sex, or religion. But otherwise it is not reviewable.

However, as I indicated in my opening statement, the Department of Justice does routinely receive reports from us as to disciplinary action taken or not taken in every instance and has the right to inquire further about details, as you just did, and be satisfied, and to make an annual commentary on the quality of discipline within the Bureau.

Senator GRASSLEY. You did comment on another question about suits against FBI agents.

It is our understanding that only three of these resulted in judgments for the plaintiffs. Have there been any disciplinary inquiries into this regarding the conduct of the defendant agents, and if that might be the case, have any of the agents been disciplined?

Mr. WEBSTER. Mr. Chairman, one of those lawsuits was the case here in Washington that involved a number of police officers and

agents at the time that we were having antiwar riots here and dealt with alleged illegal counterintelligence measures. Some of our agents were involved in that activity, peripheral to it, but are held in a joint judgment, a jury verdict. It is on appeal.

I think any type of disciplinary inquiry in that case would be premature. But we will look at it when the final results are in.

Another one involved an allegation that an agent must have been responsible for a jailer putting a notice on a board that an inmate was not to see his attorney. That case is on appeal and there is presently no basis for disciplinary action at this time.

The third case arose out of a search for individuals suspected of assaulting Border Patrol officers, and as I recall, it was in Vermont. It might not have—I will correct the record if I am mistaken on that. But it involved a supervisor who was in charge of an agent who took a gun and did not return it promptly to the owner and a lawsuit followed, saying you are responsible for the agent, and the agent did not return the gun during some kind of search and the supervisor went on and had heavy responsibilities in other field offices and it got around to a \$150 payment, as I remember it, and he just paid it because he did not want to pursue it, although we offered to take the appeal for him.

In my judgment no disciplinary action was appropriate in that case.

Senator GRASSLEY. When there is an allegation of misconduct made against an FBI agent, would the charges be investigated by FBI personnel?

Mr. WEBSTER. Yes; they are, Mr. Chairman, and I think they are the logical people. Often these allegations center around matters that involve classified or confidential information or the presence of informants and this information needs to be protected.

However, the unit, the group that does the investigating in most circumstances involving serious misconduct comes out of the Inspection Division which reports directly to me. The members of the Office of Professional Responsibility go to the area where the misconduct is alleged to have taken place and conduct a very thorough and extensive investigation. If it is not of that serious a nature, minor calls and complaints and letters and that type of thing—sometimes more often by cranks, we may permit the special agent in charge or assistant special agent in charge to conduct an on-scene investigation, provided they were not part of the activity complained of. We are very proud of our ability to root out and to give prompt discipline and not only prompt discipline but also to take the steps for criminal prosecution of any of our employees who have engaged in criminal activity.

This has, I think been a keystone of my policy since I have been in the Bureau and we have, in fact, under very trying circumstances, caused special agents to be prosecuted when they violate the law. There is no attempt of any kind to cover that activity—to protect the institution.

I think we are far better off by vigorous prosecution. Most of our agents demand that we take effective action to get any sour apples that somehow manage to get in the barrel, or became sour afterward, out of the Bureau.

Senator GRASSLEY. I might have more questions that I would like to submit in writing.

I would like to thank you very much.

I know you are a very busy person. I appreciate your time and also your staff coming with you.

Did you have anybody else that you wanted to have say anything?

Mr. WEBSTER. No; thank you, Mr. Chairman. I appreciate the opportunity to be here. This is very important to us and I think to the country.

If agents, as has been said and will be said again, if agents do not do what they should do because of fear of being involved in one of these burdensome lawsuits, even though the results, as I just said—the track record for recovery is very low, the country loses, and I think that is important to keep in mind.

Senator GRASSLEY. I thank you for your testimony, and hopefully we will be able to move this bill along and make your job and the work of your employees a little easier, at least less nerve racking.

Mr. WEBSTER. I appreciate your support, Mr. Chairman. Thank you.

[The prepared statement of Mr. Webster follows:]

PREPARED STATEMENT OF WILLIAM H. WEBSTER

I welcome the opportunity to appear before this Subcommittee today to once again lend my support to legislation which would amend the Federal Tort Claims Act. S.1775 would provide for an exclusive remedy against the United States for constitutional torts and common law torts committed by Government employees acting within the scope of their employment.

In my view, removing an employee's fear of financial ruin for acts performed while carrying out official duties is essential to the morale of the men and women of the FBI. The effects of Bivens suits on the personal and professional lives of government employees has been detailed by other witnesses before this Subcommittee. Today, I would like to identify some of the more significant problems the FBI has encountered in Bivens litigation, and also outline the Bureau's disciplinary system.

I consider the issue of providing representation to agents sued in their individual capacities a major problem. Although legal representation is supplied by the Government if an agent was working within the scope of his employment when the alleged tortious act was committed, the representation will be in jeopardy if a conflict of interest develops between the Government and the defendant agent. Private counsel may be provided in these instances but often this is contingent upon appropriations which have been depleted. Many times the conflict occurs well into the litigation and the task faced by the new attorney is overwhelming. In one particularly complex lawsuit, a conflict of interest developed six years into the suit and resulted in the defendant agents being faced with the choice of either permitting the Government to intervene and argue against the best interest of the agents, or obtaining private counsel at their own expense.

I would also add that the ability of Government lawyers to serve two masters, the United States and the individual agent, raises both ethical and moral concerns.

The current state of the law also causes concern

regarding the protection of informants. When the United States is a party to a lawsuit - either a criminal prosecution or a civil suit under the Federal Tort Claims Act - the Government may respond to demands for disclosure of an informant's identity by asserting the informant privilege, dropping the prosecution, or making an offer of settlement. But in a Bivens action these options are unavailable because the United States is not a party to the case. Inasmuch as there is no definitive authority for the United States to settle litigation against individual federal defendants, or pay settlements made by employees, the special agent sued under Bivens is faced with a double edged choice. He may pay a settlement out of his own pocket, or contest the case in court. The latter alternative could lead to the disclosure of an informant's identity and the resulting loss to society of the informant's services, as well as an increased cost to the Government due to the continued litigation.

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Under S.1775, if a constitutional tort suit against the Government results in a judgment against the United States, or an award, compromise, or settlement paid by the United States, the Attorney General must forward the matter to the head of the department or agency which employed the individual for appropriate administrative investigation or disciplinary action. This morning, I would like to outline for you the disciplinary system currently in use at the FBI.

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Unit of the Administrative Services Division at FBI Headquarters. This unit reviews the entire investigation and makes recommendations on all disciplinary matters in the FBI. We, unlike many other agencies, believe that a disciplinary system is most effective and most efficient when it is of a centralized nature. It has been for that reason that the FBI has historically retained the responsibility for administering the disciplinary system at FBI Headquarters.

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I am convinced that the FBI's disciplinary system is the best in the law enforcement community. Our ability to succeed in our mission depends upon whether we enjoy the

cooperation of the public, and that, in turn, depends upon whether the conduct of FBI employees earns public confidence. The FBI is permitted by law to select its employees very carefully and to require them to observe high standards of professionalism and conduct. I can assure you that we take very seriously any allegation of misconduct or impropriety by an employee of the FBI; we have adequate safeguards and procedures to ensure that these allegations are properly addressed.

I thank this Subcommittee for allowing me to speak on a subject of great concern to the men and women of the FBI. I would be happy to answer any questions you have.

Senator GRASSLEY. Our next witness is Peter Schuck, professor of law at Yale Law School. Mr. Schuck is the author of an article which appears in the 1980 Supreme Court Review.

A copy of that article will be placed in the record and I would like to have you proceed.

Before you start, I think for the benefit of people that have to testify, and I do not know if this is going to materialize, and if it is I want you to know about it ahead of time—we may have to take a break between 10:30 and 11. About 9 last night the chairman of the committee, Strom Thurmond, called and said that he is trying to work in a markup of the full committee and that it would be at 10:30.

At the very least, I will have to go and help establish a quorum. If there are not any bills up that I have amendments to, then I will probably leave proxy and come back.

But it was my understanding from the conversation last night that the most that would be required of me and how it might conflict with this hearing would be to take the hour of 10:30 to 11:30 off, so I hope that does not inconvenience anybody.

It is my desire to finish this hearing in order and without breaking for lunch, if that is at all possible, and hopefully without even breaking between 10:30 and 11:30.

Would you proceed, Professor Schuck?

STATEMENT OF PETER H. SCHUCK, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. SCHUCK. My testimony consists of three parts, and I will attempt to summarize them.

The first puts the *Bivens* action and system of public tort remedies that has developed in response to that action in an historical context, and the second suggest criteria against which the legislation that is before us today can be evaluated. Finally, I make a number of specific suggestions concerning particular provisions of S. 1775.

There are several developments that make today's hearings especially timely.

First, since 1946 there has been no comprehensive review of the Federal Tort Claims Act. This is an excellent opportunity for such a review and I hope that we can act upon it. There has been since that time an enormous expansion of Government activities, in the number of civil employees, and therefore in the exposure of Federal employees to liability.

In addition, a series of Supreme Court decisions have vastly increased the vulnerability of Federal officials to liability. The first line of cases began with the *Bivens* action—the *Bivens* case plus the subsequent decisions expanding upon the theoretical justification for that remedy, *Davis v. Passman* and *Carlson v. Green*. These cases did three things to the Federal Tort Claims Act and rendered the act irrelevant in three important ways: first, it covered constitutional torts not covered by the act. A substantive coverage question is therefore raised by those decisions.

Second, it enabled plaintiff to avoid the restrictions that the Federal Tort Claims Act has imposed upon claims against the Government.

And, third, it created a class of defendants who are individual officials rather than governmental entities.

A second line of cases involves the scope of immunity that officials may enjoy in cases of this kind. In *Butz v. Economou* decided in 1978, the court held that at least as far as constitutional torts are concerned, officials who are sued under a *Bivens* theory enjoy only a qualified good faith immunity. They no longer enjoy the absolute immunity that they had been thought to enjoy and that they still enjoy as far as common law torts are concerned. So there was a narrowing of immunity that could be claimed by such officials.

The final development that I shall mention is the general expansion in the liability of defendants and potential defendants under public law and private tort law. First, there has been an enormous expansion, as we all know, in the scope of obligations imposed upon government under the constitution as interpreted by the court.

Second, there has been a more general expansion of liability under State tort law. All of these developments, I think, have had a considerable effect on the nature of litigation against governmental officials.

I would next like to summarize what I conceive to be the major purposes that any system of remedies against the government for injuries inflicted by governmental officials ought to serve; it is only by examining these objectives that we can evaluate the legislation before us.

The first, of course, is deterrence of wrongdoing. The deterrent effect of any particular remedy depends upon how easy we make it for victims of wrongdoing to sue and to prevail against those that injure them, and to recover significant damages when they prevail.

Each of those questions is affected by the extent to which the law permits those officials to shift those risks to other people. There are two categories of people or entities to whom they can shift the costs of their wrongdoing. First, they can shift them back to the victims when the law provides them immunity or a good faith defense, or provides substantive exceptions to liability for concededly

illegal acts, or creates barriers to their ability to vindicate their rights by limiting their access to lawyers, or by preventing them from recovering the attorneys' fees and other costs of litigation.

They can also shift the risks of costs created by their wrongdoing to the Government, to society at large, and that can be accomplished through arrangements that enable them to be defended by Department of Justice attorneys, through indemnification or insurance arrangements, and through a bill such as S. 1775 which creates governmental liability in place of individual liability.

The problem with deterrence, and the problem with any bill that seeks to increase it is that general deterrence; that is, deterrence that operates by imposing liability for damages on a government entity, may be too imprecise. It may be too distant from the actual conduct to affect the officials in the way that we would like to.

I will return to that problem in a minute.

The second major goal of any system of public tort remedies is vigorous decisionmaking. Obviously, we want officials to act fearlessly. We want them to act vigorously and take initiative. We don't want them to cover themselves by taking elaborate precautions that are inefficient but that succeed in immunizing them from the risk of being sued.

The vigorous decisionmaking goal is in constant tension with the deterrence goal, and we must be alert to the tradeoffs between them.

The third goal is compensation of victims. Compensation is important because it tends to deter wrongdoing when the wrongdoer is obliged to pay for the wrong. But it is also important because it enables us to spread the loss created by wrongdoing from the individual victim to a larger group of people, in this case society, the taxpayers. It seems to me that loss spreading is most justifiable in those situations, which the bill attempts to address, in which government officials have injured innocent citizens. Citizens ought to be able to look to the government to relieve them of those losses that Government has caused.

The fourth goal is the morality of the rule of law which underlies remedies such as *Bivens* actions and Federal Tort Claims Act. To the extent that we immunize Government officials or the Government itself against liabilities for wrongs that its officials commit, to that extent we are undercutting the integrity and the universality of the rule of law. We ought to do so only under the most pressing of circumstances.

Finally, we want to insure that each of those goals is served at the lowest cost. We want as much deterrence, as much vigorous decisionmaking, as much compensation, and as much morality as we can. But we must, of course, be sensitive to the tradeoffs between these goals, which I will refer to in the last portion of my testimony, which addresses specific aspects of S. 1775.

In general, I think the bill has some excellent features. Its substitution of a direct remedy against the United States and its provision that that remedy shall be exclusive, is a very significant development, one that ought to expand vigorous decisionmaking, and expand compensation. It is consistent with what I regard as the moral precepts that ought to underlie this system of law. I am very much in favor of that.

A second very excellent feature of the bill is its treatment of intentional torts. It narrows the immunity for nonconstitutional intentional tort and it entirely eliminates the existing immunity under the Federal Tort Claims Act for constitutional torts. I think both the narrowing and the elimination are entirely desirable. There is no justification whatsoever for the exemption that now exists under the Tort Claims Act for many intentional torts, and I applaud the subcommittee for taking this step.

Finally, I regard as a positive though an inadequate step the provision that requires the Attorney General to notify the agency that employs the official that has behaved illegally and has occasioned liability for the Government.

I think the bill is, however, far too cautious, in certain respects. With respect to intentional torts, it fails to eliminate the exemption entirely. It retains immunity for the Government with respect to intentional torts of a nonconstitutional nature.

For reasons I will go into, if you are interested, I think the distinction between constitutional torts and nonconstitutional torts is not a very important one. It is an analytical one, of interest only to academics, and certainly not relevant to the purposes of this bill, and it ought not to be the basis for retaining an immunity for certain kinds of intentional torts.

The bill is also far too cautious, I fear, in dealing with the subject of disciplinary sanctions against officials that violate the law. This is a very difficult problem. I have no panaceas to suggest, but requiring the Attorney General to notify the agency is certainly an inadequate step to address the very real problem that occurs when we remove the individual sanctions against officials that the *Bivens* action provides. I favor doing so, but we also need to be concerned about the effect of that step on deterrence.

I do think that the bill has several highly objectionable features. The first is the retention of a good-faith defense. In fact, it is not merely retention of a good-faith defense. It is creating for the first time a good-faith defense in actions against the Government. The good-faith defense is arguably justified in connection with lawsuits against individual officials but in connection with suits against the Government itself, it has no place. In such a system individuals do not need the good-faith defense to preserve their vigorous decision-making and the Government ought not to claim it. The inscription over the Department of Justice, I think, says that the Government wins when justice is done. The Government ought to insure that wrongs that occasion harm to citizens are compensated, whether committed in good faith or not, so long as the vigorous decision-making of officials is not jeopardized, and I take it that the substitution of the action against the United States accomplishes that purpose.

A second highly objectionable feature, although it simply retains what is already in the act, is the prohibition on punitive damages. That prohibition might make sense in a system in which damage awards are assessed by a jury. There, we might be concerned about the inclination of juries to assess excessive damages against deep-pocket defendants, but where judges are doing the factfinding, as in cases under the Federal Tort Claims Act, that problem is minimal. The prohibition on punitive damages, in conjunction with the very

inadequate minimal damages and the ban on attorneys' fees shifting, is a serious barrier to the adequacy of the compensatory mechanism under this bill.

My final category of comments relates to issues that the bill unfortunately does not address at all, but ought to.

The first relates to attorneys' fees. Awards of attorneys' fees in litigation against the Government are now almost routine in section 1983 actions against State and local governments and State and local officials, and in actions involving the United States under numerous regulatory statutes, as well as in actions covered by the Equal Access to Justice Act of 1980. That act contains an explicit prohibition of fee shifting in torts cases. I cannot imagine any justification for such provision. I have tried and tried to come up with one and I am simply at a loss to understand that particular exception. I think if we want these actions to be brought to vindicate the right of citizens, if we want deterrence to operate effectively, we must insure that legitimate, meritorious actions are brought. The prohibition on awards of attorneys' fees, I think, makes this unlikely.

A second area that I will just mention, a rather technical area but one of some importance, is that the Federal Tort Claims Act as interpreted by the courts limits the sources of law that may be a ground for a violation of the act, for remedy under the act. It limits it to wrongs under State private tort law. Now the bill, and I think it a good thing, expands this to include constitutional torts as a basis for liability under the Tort Claims Act. What it does not do is address the remaining exceptions for torts that are based not on private law or State tort law, not on Federal constitutional law, but on Federal statutes, Federal regulations or Federal common law.

Finally, there are a number of remaining restrictions in the Federal Tort Claims Act which the bill does not address and which, for reasons I suggest in my written testimony, ought to be made the subject of coverage by the Tort Claims Act, rather than being exempted from its ambit. Those include, for example, the exception for discretionary functions. The exception is far broader than necessary. Also objectionable are the exceptions for torts under strict liability principles and one or two others that I have mentioned in my testimony.

I would like to mention one other area that the bill does address and that I think is a major step forward but, unfortunately, inadequate. That is the provision in the bill for minimum liquidated damages for violations of constitutional law by Federal officials. This is a major and important innovation in the Federal Tort Claims Act recognizing the fact that many violations are not easily monetized. That is, many rights, though precious, do not give rise to significant out-of-pocket damages. The bill recognizes that reality and attempts to address it. However, the provision for minimum liquidated damages ought to extend not only to constitutional torts but to non-constitutional torts, where money damages calculated in the conventional way, are simply inadequate. In addition, the minimum liquidated damages figures that are provided in the legislation are simply too low, especially in view of the prohibition that remains in the bill against attorney fee shifting, and against punitive damages.

I think I will stop there. There are more details in the testimony. I would be happy to answer any questions you may have, Senator. Senator GRASSLEY. You wanted your entire statement printed in the record?

Mr. SCHUCK. Yes.

Senator GRASSLEY. It will be.

I already announced that we were going to, with your permission, print your article as part of the record, as well.

I want you to know that I am impressed with your indepth consideration of this legislation, your reaction to it, your constructive suggestions as well as your constructive criticism.

I have three or four questions that I would like to ask you.

With this first question, I refer to your prepared testimony. I notice that you mention that providing for direct governmental liability may improve the deterrence. I would like to have you elaborate on that.

Mr. SCHUCK. I say it may. One cannot be sure because it depends really on the way in which individual agencies respond to the judgments rendered against the Government.

If the judgments are rendered against the Government and they are simply charged to the U.S. Treasury, and no penalty is imposed upon the individual agency, or a penalty is imposed upon an individual agency but it cannot be made to stick because of various budgetary adjustments that might be made, then the agency has no financial incentive to reduce the level of wrongdoing by its officials.

It may have other incentives and Director Webster has indicated the way in which the FBI moves in those directions.

But given the testimony of the Attorney General in 1978, and given other evidence, there is reason to believe that the disciplinary systems that operate on Federal officials are not nearly as effective as Director Webster claims the FBI system is.

Senator GRASSLEY. I agree with you and I am sending out letters to every agency which I hope will have the end result of probing into how thorough their procedures are and the extent to which they follow established procedures so that we have that information before markup and also to answer some of the doubts people have.

Mr. SCHUCK. I think that is a very useful step.

Senator GRASSLEY. Next, I understand that you have some reservations about the disciplinary procedures provided in this legislation.

I am sure that we are going to hear from other witnesses today who might further explain these provisions.

But I have a question in regard to whistle blowing, whether or not you feel this legislation will curtail that protection on the part of Government employees?

Mr. SCHUCK. No, I do not see why it would discourage whistle blowing by Federal officials.

Senator GRASSLEY. Let me tell you where my question comes from, then.

In one of the other days of hearings we had on this subject we had a witness that suggested that could be the result.

Mr. SCHUCK. What was the reasoning, do you recall?

Senator GRASSLEY. The inability to probe indepth because of their shield.

Mr. SCHUCK. I think in fact that by immunizing individual officials against the prospect of personal liability, it may encourage whistle blowing because I think some officials may well be concerned about being sued by people they may accuse of wrongdoing, and this would immunize them, to the extent that they were acting within the scope of their employment, against the prospect of individual liability.

Senator GRASSLEY. So then in sum, it is very beneficial to encourage—

Mr. SCHUCK. Well, I am not sure. At the very least, I do not see—

Senator GRASSLEY. At least, it is no harm?

Mr. SCHUCK. I do not see that it would do any harm.

Senator GRASSLEY. I thank you for covering that point.

Next, I want to refer to your Law Review article.

You devoted much time in that article to some of the social aspects involved in this issue.

Could you explain to us specifically which Government employees are susceptible to suits?

Mr. SCHUCK. Well, the Government officials most susceptible to suits are not, in fact, Federal officials, but State and local officials who are caught in a system in which sovereign immunity is more widespread in some respects than it is under the Federal system.

As to the particular categories of officials, which may be what you are getting at, the data on this are extremely thin and the best evidence suggests that the categories of officials most vulnerable are police officers, FBI agents, drug enforcement agents, school teachers, school administrators, increasingly inspectors. Those are the major ones. There are areas of litigation that are being opened up against social workers. I think those are the major ones.

Let me repeat, as the witnesses from the Justice Department will attest, the data on these litigations are very, very difficult to come by and they are not broken down by category of defendant.

Senator GRASSLEY. And my last question is a desire for your opinion on a proposal that came out of a previous hearing. In that hearing we heard a suggestion that defendants have the ability to implead the United States if they could demonstrate they are entitled to a good faith defense.

Do you feel that mechanism would be more desirable than direct Government liability?

Mr. SCHUCK. No; I would oppose that.

I think it is very important that officials be free of the specter of being dragged into litigation, so long as there exists a viable and effective disciplinary mechanism for assuring individual accountability once the Government pays its judgment.

But I think impleading the U.S. Government, while it might have the virtue of assuring a deep-pocket defendant, would not prevent protracted litigation against individual officials.

Senator GRASSLEY. That is all the questions I have.

Thank you for your indepth consideration of this legislation and sharing those thoughts with us.

[The prepared statement and article by Mr. Schuch follow:]

PREPARED STATEMENT OF PETER H. SCHUCK

I wish to thank the Subcommittee for inviting me to testify on S.1775, a bill to alter the structure of tort remedies for misconduct by Federal officials. As a former "public interest" lawyer and federal official here in Washington, and as a current teacher and scholar in the areas of torts and administrative law, I have had a long-standing concern about the adequacy of legal remedies for official wrongdoing. I am also in the final stages of writing a book on the subject, which I expect to be published by Yale University Press in 1983. It will be entitled, appropriately enough, Suing Our Servants.^{1/}

I

Several developments since 1946, when the Federal Tort Claims Act (FTCA) was adopted, make these hearings especially timely. First, the federal government has taken on many new functions and expanded old ones. These enlarged activities have increased the potential, and perhaps actual, magnitude of official misconduct -- by which I mean to include negligence, intentional wrongs, violations of statutory duty, and actions for which private tort law principles impose "liability without fault" or "strict liability". The greatest growth in public employment during this period, of course, has occurred at the state and local levels. But even at the federal level, civilian employment has mushroomed from 2.4 million in 1955, to almost 2.9 million in 1979, an increase of over 20%.^{2/} The existence of more officials with more tasks to perform implies that more errors will be made.

Second, Supreme Court decisions during the 1970's have converged in a way that effectively makes more federal officials more vulnerable to more litigation and liability than ever before. One group of cases, beginning with Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics^{3/} and continuing through Davis v. Passman^{4/} and Carlson v. Green,^{5/} has encouraged damage actions against Federal officials. These actions were unprecedented in three ways. First, they alleged constitutional torts not then covered by the FTCA. Second, these new cases were able to circumvent the FTCA's substantive and procedural restrictions, such as its bar to a jury trial and to punitive damages, its limit on the fees that plaintiffs' attorneys may charge, and its substantial exceptions to liability, which had been quite patently designed to favor the government. Third, the named defendants in these litigations were individual officials, not the United States. (Although officials could already be individually named as defendants in most non-motor vehicle accident cases under the FTCA, this possibility

took on greater importance in these cases, where the government could not also be sued.) The effect of these decisions upon the volume of litigation against individual officials has already been documented by Administration witnesses, and I would only add that the full litigation-inducing effects of the Carlson decision, which is less than two years old, have probably not yet become evident.

A second line of cases has emerged only since 1978, when Butz v. Economou^{6/} was decided by the Court. Economou narrowed the immunity that most Federal officials can claim in constitutional tort cases. Before Economou, it had been assumed that under Barr v. Matteo,^{7/} federal administrative officials enjoyed an absolute immunity in all cases; Economou, however, limited the absolute immunity rules of Barr to common law torts, conferring only a qualified "good faith" immunity in constitutional torts cases. I believe that the distinction between common law and constitutional torts makes little sense as a basis for allocating immunities (or indeed anything else in this area),^{8/} but my only point here is that Economou fundamentally changed important rules of the game. After Bivens-Davis-Carlson, the risk that federal officials would be sued was considerably greater than before, as was the risk that punitive damages would be awarded against them. After Economou, the risk that they would have to go all the way to trial in order to establish good faith and thereby vindicate themselves was also greater. That plaintiffs seldom prevail against them in the end is an objective fact, but the policy conclusions to be drawn from this fact, as I shall indicate later, are rather different than some have supposed.

The third and last development that I shall mention is a more general expansion in the scope of tort liability during the 1960's and 70's resulting from the enlargement of the government's legal obligations to citizens under the Constitution, federal statutes, administrative rules, and federal court decisions, and from the growth of liability under state tort law, the substantive foundation for the FTCA remedy. Thus, federal public law has subjected the government to higher standards of conduct in virtually every area of its responsibility (as well as multiplying those areas), while state private law has vastly expanded the basic concepts of tort liability, including legal duty,^{9/} proximate cause,^{10/} the standard of reasonable care,^{11/} damages,^{12/} vicarious liability,^{13/} and strict liability,^{14/} while narrowing defenses to liability, such as assumption of risk,^{15/} contributory fault,^{16/} and common law immunities.^{17/} To the extent that claims against officials and government are affected by these changes -- and they are, of course -- the risks to them of litigation and liability are increased.

II

An analysis of any system of public tort remedies must begin with the social purposes that such a system is designed to serve. In my view, there are four with which the system should primarily be concerned and a fifth that integrates those four. The first is deterrence of official wrongdoing. This is affected not simply by the magnitude of the sanctions that may be applied upon a finding of misconduct but also by the probability that those sanctions will in fact be imposed. Deterrence may be enhanced, by making it easier for victims to sue, to prevail, and to obtain significant damages (or other relief). Deterrence may also be blunted, by making it easier for officials to shift the risks of litigation and liability elsewhere -- either back to the victim (through immunities, exceptions to substantive coverage, a "good faith" defense, barriers to plaintiffs' obtaining legal counsel, etc.) or up to the agency or government as a whole (through provision for free legal representation, indemnification, insurance, or creation of a cause of action directly against the government itself). Deterrence may be obtained through what my colleague Guido Calabresi has called "general deterrence," in which the costs of misconduct are measured and imposed upon those in a good position to minimize those costs, or through "specific deterrence", in which a collective decision is made (usually by statute or regulation, but sometimes by court injunction) that particular activities are undesirable and ought to be prohibited.^{18/} The FTCA employs general deterrence and is therefore subject to the weaknesses of that method. These include the difficulty of measuring certain kinds of harms, the indirectness of control stemming from reliance upon fiscal incentives to induce agencies to shape employee behavior, and the imprecision and post hoc nature of liability signals.

The second goal is what I call vigorous decisionmaking. It is the desire to encourage officials to take initiative, act decisively, and perform their jobs without constantly worrying about protecting themselves against the possibility that they will be hauled into court. We want law enforcement agents to follow up on suspicious behavior, prison guards to quell disorders, inspectors to cite violators, and supervisors to discharge or discipline incompetent or malingering employees. We do not want these officials to look the other way, to sit safely at their desks or in their patrol cars, or to spend an inordinate amount of time creating paper trails behind them in order to position themselves for future litigation -- even though each of these strategies does in fact minimize or even eliminate the risk that they will violate someone's legal rights. We know that

official passivity is safer for them, but we also know that it is not always safer for us. We want them to be deterred but recognize that if they are over-deterred, we will have sacrificed many of the substantive ends for which government is instituted in the first place. Deterrence and vigorous decisionmaking, then, are objectives that coexist in constant and inescapable tension and conflict.

The third goal is compensation of victims. We value compensation not simply because it tends to deter illegality by those who must pay but also because we think that it is usually better and fairer that losses be spread among a large number of people rather than being allowed to remain concentrated on innocent victims. While there is endless disagreement about whether tort law should advance some affirmative conception of a just distribution of wealth, almost everybody would surely agree that public tort law should not operate to the systematic detriment of those who are already relatively disadvantaged in society. Moreover, there is probably widespread agreement that loss-spreading through compensation is justified where a citizen has been injured through no fault of his or her own by an official whose potential (and perhaps even tendency) to injure has been created by the public for public ends. Although reliable data on these questions are not available, I believe that these rather minimal criteria of efficacy and justice are not satisfied by the existing system.^{19/}

A fourth goal is to affirm the morality of the rule of law. This goal is related to compensation -- after all, a regime of public law that consistently and systematically fails to compensate many innocent victims of official wrongdoing cannot be regarded as either effective or just -- but it is not unique to compensatory remedies. By placing the moral and coercive powers of the state behind our values, tort adjudication performs important symbolic functions. When public tort law immunizes official violations of substantive or procedural rules, the integrity and universality of those rules and their underlying public values are inevitably called into question.

The final goal, system efficiency, is self-evident. We want to accomplish the above goals -- deterrence, vigorous decisionmaking, compensation, and morality -- to the greatest extent and at the lowest social cost. Achieving this goal demands that close attention be paid to how these different goals are traded off against one another in the real world, as they must be. My own view is that the present system is so sub-optimal on each of these counts that important social gains can almost certainly be made by some relatively straightforward changes in the system.

III

The Subcommittee is to be commended for creating a forum in which these questions can be systematically explored, and for developing a bill, S.1775, that begins to address them. S.1775 would establish several very salutary principles for reforming the system -- most notably, by substituting a direct tort remedy against the United States for one against individual officials and making that remedy exclusive; by narrowing the immunity that remains under the FTCA for certain intentional torts and for certain other torts arising from constitutional claims; by providing for minimum liquidated damages for constitutional torts; and by requiring the Attorney General to inform an official's agency of any adverse judgments resulting from his or her conduct. Unfortunately, however, the bill does not go nearly far enough in some of these respects, while in others -- especially in retaining a "good faith" defense and flatly prohibiting punitive damages -- it proceeds in precisely the wrong direction. Finally, it wholly fails to address certain problems, such as attorneys fees, the limited permissible sources of substantive law for compensable non-constitutional torts, and certain ^{FTCA} remaining restrictions upon FTCA liability, that greatly weaken the present system. I shall discuss each of these points in the remainder of my remarks.

The Direct and Exclusive Remedy Against the United States

Section 5 of the bill would make the remedy against the United States exclusive for all torts covered by the FTCA. This provision would advance compensation goals by assuring a governmental defendant that can respond fully and promptly to any judgment rendered against it. It would distribute socially-caused losses among millions of taxpayers instead of concentrating them on innocent victims. Coupled with the existing rule preventing the government from seeking indemnification from officials,^{20/} it would strengthen vigorous decisionmaking by immunizing individual officials from the threat of personal liability. Governmental liability also reinforces the morality of our public law by imposing the costs of wrongdoing upon the entity responsible for recruiting, training, guiding, constraining, managing, and disciplining those who injure others, rather than upon those individuals who are often in a poor position to alter the larger context in which wrongdoing occurs and is frequently encouraged. An agency that wishes to alter official behavior has many options for exerting its influence; the individual official who wants to change things often has few or none.

For the same reason, direct governmental liability may improve deterrence. I say "may" because this conclusion is far from being certain. Obviously, by elimina-

ting the risk of personal liability, governmental liability reduces somewhat the expected costs of misconduct to individual officials. But the question of deterrence is more complicated. First, officials who are sued usually receive legal representation at public expense and, because of their good-faith defense, almost always prevail; hence, the existing system, even after Bivens-Davis-Carlson, already reduces the personal costs to officials of misconduct. The availability of a "good faith" immunity, which apparently is almost always invoked successfully in such cases, reduces the expected costs to the official even further. Even those considerations, however, do not answer the question about deterrence. There is reason to believe, for example, that public officials tend to be what economists call "risk-averse"; that is, they will go to some lengths to protect themselves against contingencies that are very unlikely to occur but that will be personally catastrophic if they do occur. As the poignant testimony at earlier hearings on this bill by Dr. Marvin Schneiderman of N.I.H., forest ranger Lehman, and some others indicated, a lawsuit for damages appears to be such an event.^{21/} When a Washington, D.C. jury renders a verdict for more than \$700,000 against individual FBI agents and police officers after years of turbulent litigation,^{22/} their counterparts throughout the nation are almost sure to hear about and be affected by it -- for better, for worse, or both. The fact that these officials will probably be indemnified and such verdicts are very rare may well be irrelevant to risk-averse officials. Why should they take the chance?

The effect upon deterrence of moving from individual, official liability to direct governmental liability also depends upon how the agency responds to the judgment. This in turn depends upon whether the judgment is absorbed by the Treasury or is charged to the agency's or program's budget, and if the latter, whether that charge can be made to "stick" or can be evaded by fiscal or political manipulation. It also depends upon what disciplinary, educational, or other measures the agency takes in order to prevent a recurrence of the misconduct, and how effective those measures are in actually influencing the behavior of officials at lower levels of the bureaucracy. Because these variables are so important, it is most regrettable that S.1775 makes no effort to affect them. Thus, it does not seek to encourage the government to assess the costs of litigation and liability at the level of the bureaucracy where it can create the strongest incentives and have the greatest influence in deterring misconduct. (At least one other statute of which I am aware has attempted to do so.^{23/}) Nor does the bill have anything to say about administrative discipline of errant officials, other than in Section 5(c) which I discuss below.

On balance, the substitution of governmental for official liability seems unlikely to affect deterrence significantly one way or the other. More likely, it will leave deterrence essentially unchanged. But major gains in compensation, vigorous decisionmaking, and the morality of the system seem probable and in my view amply justify the change. And to the extent that more deterrence is desired, it may be advisable to seek it not through personal tort liability for officials but through more direct, "specific deterrence" measures.

The Intentional Tort and Other Exceptions to FTCA Liability

Under the present FTCA, the government remains immune from claims arising out of liability for libel, slander, misrepresentation, deceit, or interference with contract rights committed by federal officials, and also (even after the post-Bivens amendment in 1974) remains immune from claims arising out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by federal officials other than "investigative or law enforcement officers" (which term is narrowly defined). The bill would bifurcate this exceptions provision. For claims not arising under the Constitution, Section 6 would narrow the category of immunized intentional torts to include only libel, slander, misrepresentation, deceit, or interference with contract rights. For claims arising under the Constitution, however, Section 7 of the bill would eliminate this exception altogether, leaving intentional torts fully covered.

So far as I can tell, the legislative history of the original FTCA fails to explain, much less justify, the exception for intentional torts,^{24/} and it is difficult even to imagine what such a justification might be. An exception for intentional torts flies in the face of strong trends in private tort law at the state level, where the vicarious liability of employers increasingly extends to any intentional torts that have even an attenuated linkage to the employment.^{25/} The changes effected by Sections 6 and 7 would promote compensation, deterrence, and morality, with little or no effect upon vigorous decisionmaking (because of the intent requirements entailed in proving these wrongs). The only questions are why the bill does not go further to eliminate the exception for non-constitutional intentional torts entirely, and why the coverage or non-coverage of intentional torts should be made to depend upon whether they are thought to arise under the Constitution or under some other source of law. I urge the Subcommittee to reject this use of the distinction and instead to make all intentional torts actionable under the FTCA.

There are other dubious exceptions to, or restrictions upon, liability under

the FTCA that the bill should narrow or eliminate entirely. First, the present FTCA excludes liability for "any claim. . . based upon the exercise or performance or the failure to exercise a discretionary function or duty. . . whether or not the discretion involved be abused."^{26/} Although the legislative history advances no rationale for the exception, it presumably seeks to encourage vigorous decision-making by agencies and limit judicial second-guessing of bureaucratic policy judgments. Both of these purposes are valid, indeed essential, and I strongly support them. The exception, however, is broader than necessary to secure them. It explicitly retains immunity for abuses of discretion even though the courts can review agency decisions for such abuses and routinely do so under the Administrative Procedure Act.^{27/} While there is always some danger that the courts will seize upon this standard to intrude excessively into the domain of administrative judgment, that risk has not yet materialized in federal cases and seems acceptable in the interests of confining the immunity to its proper sphere. In addition, some lower courts, no doubt encouraged by an early decision by the Supreme Court interpreting the exception to immunize routine low-level implementation of high-level policy decisions,^{28/} have construed it more broadly than seems justified given the competing interests at stake.^{29/} Precisely because virtually all actions are "discretionary" in some sense, the term should be restricted to non-routine, substantially judgmental, policy-type decisions. Indeed, Section 7 seems to concede my point by eliminating the exception altogether in constitutional tort cases. For reasons discussed above, this desirable change should not be so limited but should extend to all official wrongs.

The FTCA has also been interpreted to provide a remedy only against acts or omissions that are tortious under state law in the jurisdiction where they occurred; that is, the United States is liable only in circumstances in which a private individual under like circumstances would be liable under state law.^{30/} This limitation creates two anomalies. First, most federal statutes and regulations create legal duties that are not imposed by state law upon private citizens and therefore cannot give rise to liability under the FTCA. Upon this reasoning, for example, remedies have been denied for harm caused by an official's failure to require a bond as required by federal statute^{31/} and for injuries caused by an OSHA inspector's failure to follow up on a citation for safety violation.^{32/} Second, even constitutional torts are thereby rendered immune from liability under the FTCA unless they can somehow be framed as state law torts. But because federal constitutional prohibitions do not ordinarily apply to private individuals,

this condition may be difficult to meet.^{33/} And because federal violations sometimes do not offend state law, FTCA actions cannot always be grounded directly upon violations of the federal Constitution.^{34/} The legislative history of the FTCA presents no rationale for this restriction. Moreover, the subsequent explosion of federal law that lacks any counterpart in the private tort law of the states, coupled with the expansion of federal constitutional rights to which I have already alluded (rights for which direct tort remedies have been recognized under a Bivens theory), argues strongly against this restriction and in favor of the complete integration of distinctively federal law torts into the remedial structure of the FTCA.

Section 3 of the bill makes some inroads into this restriction by recognizing the Constitution as an additional basis for liability under the FTCA, but it fails to add other, non-constitutional sources of federal law as a basis for liability. This exclusion will continue to deprive valid claimants of meritorious relief under the Act. It is unjustified, incoherent, and should be repealed.

Another indefensible restriction that the bill does not address at all is the limitation of FTCA coverage to acts or omissions that are "negligent or wrongful,"^{35/} which has been interpreted to include only negligent or intentional torts and to exclude conduct that would only be tortious under state law under principles of strict liability.^{36/} It is difficult to comprehend why a remedial scheme like the FTCA, grounded as it is upon state tort law, should continue to immunize the relatively well-defined categories of activity (e.g., defective products, abnormally dangerous conduct) that generate strict liability under that body of law.^{37/}

Minimum Liquidated Damages for Certain Torts

Adequate compensation of victims implies not merely that liability should be imposed but that the resulting judgment should make the victim whole. Effective deterrence requires that damages be more than merely nominal. Many constitutional and other legal rights, however, cannot readily be converted into monetary terms. The nominal damages often awarded for their violation are inadequate;^{38/} punitive damages might perhaps remedy this defect but the FTCA expressly bars them^{39/} and Section 3 of the bill would continue this prohibition. The Bivens remedy, which the bill would supplant, protects many values that resist monetization, such as dignity and privacy. If a police officer lacking a valid warrant or probable cause kicks down a citizen's door and invades his or her home, the citizen is hardly compensated when the government replaces the door.

This problem has a relatively straightforward solution, one that S.1775 employs in Section 3 -- the provision of minimum liquidated damages that are automatically assessed in order to ensure adequate compensation and deterrence. The difficulties with the bill in this regard are twofold. First, this remedy is limited to constitutional torts, while the problem may be a broader one. Second, both the \$1000 minimum damages amount and the \$15,000 ceiling amount are too low, especially in view of the continued failure of the FTCA to permit an award of counsel fees to successful plaintiffs, a problem that I discuss below. In these regards, it is quite instructive to compare Section 3 to the comparable provision in 18 U.S.C. §2520, creating a civil damage remedy against illegal wiretappers (a remedy that Section 9 of the bill would curtail, at least as applied to federal officials). 18 U.S.C. §2520 also provides for minimum damages of \$1000, but contains no ceiling on liquidated damages in the case of continuing violations and authorizes both punitive damages and an award of counsel fees and litigation costs to successful plaintiffs. The amounts prescribed in Section 3 might be adequate if, as in 18 U.S.C. §2520 and other statutes providing minimum liquidated damages (for example, the Truth-in-Lending Act),^{40/} an award of attorneys fees and/or punitive damages were authorized. Absent such awards, the minimum damages would be far too low to defray the plaintiff's costs of suing, much less compensate him or her for the actual deprivation of legal rights or encourage private enforcement of public law norms (the other purpose of minimum damage provisions). I do not know what an appropriate schedule of damages would be,^{41/} but that provided in the bill is clearly inadequate.

The blanket prohibition of punitive damages in Section 3 is likewise regrettable. If FTCA cases were tried to a jury, there might be a legitimate concern about the possibility that juries sympathetic to deserving victims might casually award punitive damages against an exceedingly "deep pocket" defendant, the United States. But since judges assess damages in FTCA cases, this concern is not credible. In view of the prohibition on attorneys fee awards, the inadequacy of the minimum damages provided, and the authorization of punitive damages in other statutes, the bar to punitive damages becomes even more ^{indefensible}. At the very least, the provision should be rewritten to permit such awards under certain conditions specified in the statute.

Notification of the Employing Agency

The substitution of governmental for official liability is justifiable, as I maintained earlier, only if deterrence is not unduly weakened thereby. I suggested that an important factor affecting that question is the efficacy of the system of

administrative discipline that remains for dealing with the individual official wrongdoer. It is disappointing, therefore, to note that the only mention of administrative discipline in S.1775 is in Section 5(c), which requires the Attorney General to "forward the matter" to the employing agency for whatever action "may be appropriate." Obviously, this provision by itself will do nothing to assure the public that officials whom the bill relieves of the threat of tort liability for their wrongs will nevertheless face credible and effective disciplinary sanctions by their agencies, whose narrow bureaucratic interests are not always congruent with the public interest, to say the least. Nor, as I suggested earlier, can we be certain or even confident (especially given the bill's silence on the subject) that the damage judgment against the Treasury will be transmitted downward to the agency's budget, where it might have some influence on the agency's incentives to control employees' misconduct.

This is an extremely difficult problem -- politically, intellectually, and technically -- and I have no panaceas to suggest. I have addressed this problem in an earlier article,^{42/} although not wholly satisfactorily, and hope to make some useful suggestions in my book. I look forward to learning more from today's witnesses who will be discussing this question. What seems perfectly clear, however, is that the bill needs strengthening in this respect. At the very least, the Subcommittee might study the kind of disciplinary procedure mandated by the Freedom of Information Act.^{43/} I know nothing about how this procedure has in fact worked, but it at least recognizes the importance of the problem of ensuring individual accountability in a system of governmental liability.

Retention of the "Good Faith" Defense

Traditionally, it was assumed that in view of the FTCA's explicit restrictions of liability (which I have already discussed), no additional "good faith" defense to liability was intended or warranted. When some intentional torts became actionable under the FTCA in 1974, however, the United States began asserting such a defense and at least one appellate court has recognized it.^{44/}

This decision has been criticized,^{45/} and with good reason, in my view. The purpose of a good faith defense, after all, is to protect vigorous decisionmaking by officials. In a system that, because of sovereign immunity rules and restrictions on respondent superior liability of government, is obliged to rely heavily upon the individual liability of officials, such a defense is amply justified. Indeed, I have argued that under such a system -- the 1983 remedy is an example -- the defense may need strengthening.^{46/} But the fundamental premise of the FTCA and of

this bill, a premise that I strongly support, is that by creating a remedy against the United States and by making that remedy exclusive (at least for those torts to be covered by the FTCA, vigorous decisionmaking will be adequately protected. That being the case, there can be no warrant for denying compensation (and therefore, to some degree, weakening deterrence) in cases where, by hypothesis, an official wrong has been committed and injury sustained, simply because the official meant well. Section 5(a) of the bill already affords officials all the protection they need; retaining the good faith defense simply protects the Treasury in situations in which compensation is (again by hypothesis) legally and morally justified.

In a way, retaining the good faith defense in a system of governmental liability is subject to an even stronger objection than Judge Cardozo's now classic formulation of the case against the exclusionary rule: "The criminal is to go free because the constable has blundered."^{47/} Here, the innocent victim is to go uncompensated because the official violator blundered. That is, the government, with far less at stake (indeed, nothing at stake except its rather dubious interest in denying payment to deserving claimants that it has injured), works an injustice on the other party. Finally, even if governmental liability posed a threat to vigorous decisionmaking that it was necessary to dispel, the good faith defense would not necessarily do the job, for its resolution often requires factual development that can only occur through a full-scale trial. Even in a world in which individual liability is a significant factor, the defense as presently administered may in fact deny justified compensation while not significantly advancing vigorous decisionmaking.^{48/} In a system of governmental liability, however, the defense has no proper place.

Attorneys Fees and Litigation Costs

A great weakness of the present FTCA and Bivens remedies, one not addressed by the bill, is the bar to awarding attorneys fees and litigation costs to successful plaintiffs. While the "American rule," which generally prohibits the shifting of fees and costs, has much to be said for it in most private law disputes, it has little or no justification in cases in which citizens successfully demonstrate that their government has wronged them, and thereby vindicate social as well as private interests. The public interest demands that such suits be brought and that such persons be made whole, which is not possible if they must bear their own fees and costs. Today, fee-shifting is authorized in a wide variety of public law cases in federal courts, including 1983 litigation, cases under many

Federal regulatory statutes such as the Clean Air Act, and in proceedings covered by the Equal Access to Justice Act of 1980.^{49/} That Act, however, like the FTCA itself, expressly prohibits such awards in tort cases against the United States.^{50/} I am unable to fathom any rationale for separating out tort cases from this sensible policy, and urge the Subcommittee to eliminate this anomalous and unjust prohibition.

Also objectionable is the FTCA provision that makes it a crime for plaintiffs' attorneys to charge more than 25% of a judgment or more than 20% of a settlement.^{51/} This percentage, which has not been changed since 1966, is lower than the contingent fee charged by many attorneys in private tort cases and may effectively preclude many valid claimants from being represented, as the pre-1966 ceiling apparently did.^{52/} Since the United States employs salaried attorneys to defend such cases and is not liable for interest prior to judgment, its incentives to settle are probably less, and the prospects for protracted litigation greater, than in most private tort cases. To encourage lawyers to accept such cases, contingent fees must be large enough to compensate not only for services rendered in the cases that they win but also for those in cases they lose (in which, of course, they receive nothing). For the government to injure citizens and then, in the name of consumer protection, to deny them access to lawyers who can remedy those injuries is doubly ironic -- and doubly unjust. If there is a problem of over-reaching by lawyers in FTCA cases, which has not to my knowledge been demonstrated, a fee ceiling seems like a Draconian, and probably perverse, way to address it. At the very least, the effects of this ceiling should be investigated and if it is too low, it should be raised -- or perhaps repealed altogether.

Conclusion

Again, I want to applaud the Subcommittee for convening these hearings. I hope that you will use this opportunity not simply to respond to one isolated problem or another, this Supreme Court decision or that, but to undertake the first comprehensive review of the FTCA since its adoption 36 years ago. Such a review is long overdue and I would be happy to assist the Subcommittee to drag this important citizen remedy kicking and screaming into the 1980's.

Footnotes

1/ It expands upon my article of the same title, published in 1980 Supreme Court Review 281 (1981).

2/ Statistical Abstract of the United States, 1980, at 279.

3/ 403 U.S. 388 (1971).

- 4/ 442 U.S. 228 (1979).
- 5/ 446 U.S. 14 (1980).
- 6/ 438 U.S. 478 (1978).
- 7/ 360 U.S. 564 (1959).
- 8/ See Schuck, supra note 1 at 324.
- 9/ E.g., Tarasoff v. Regents of the Univ. of California, 17 Cal. 3rd 425 (1976).
- 10/ E.g., Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980).
- 11/ An example is the recent evolution of doctrine of informed consent. E.g., Canterbury v. Spence, 464 F.2d 772 (D.C.Cir.), cert. denied 409 U.S. 1064 (1972).
- 12/ E.g., Dillon v. Legg, 68 Cal. 2d 728 (1968).
- 13/ E.g., Rodgers v. Kemper Constr. Co., 50 Cal. App. 3rd 608 (Ct. App. Cal. 1975).
- 14/ E.g., Spano v. Perini Corp. 25 N.Y.2d 11 (1969).
- 15/ E.g., Rosenau v. City of Estherville, 199 N.W.2d 125 (Iowa 1972).
- 16/ E.g., Li v. Yellow Cab Co. 13 Cal. 3rd 804 (1975).
- 17/ E.g., Muskopf v. Corning Hospital District, 55 Cal. 2d 211 (1961).
- 18/ Calabresi, The Costs of Accidents (1970).
- 19/ See Schuck, supra note 1.
- 20/ United States v. Gilman, 347 U.S. 507 (1954).
- 21/ See hearings before Subcommittee on Agency Administration, Senate Judiciary Committee, November 13 and 16, 1981.
- 22/ See New York Times, December 24, 1981.
- 23/ E.g., 28 U.S.C. §2412(c)(2).
- 24/ See Boger, Gitenstein and Verkuit, "The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis," 54 N. Car. L. Rev. 497 (1976).
- 25/ See supra note 13.
- 26/ 28 U.S.C. §2680(a).
- 27/ 5 U.S.C. §706(2)(A).
- 28/ Dalehite v. United States, 346 U.S. 15 (1953).
- 29/ E.g., Amer. Assn. of Commodity Traders v. Dept. of Treasury, 598 F.2d 1233, 1235 (1st Cir. 1979).
- 30/ 28 U.S.C. §§1346(b) and 2674. See United States v. Muniz, 374 U.S. 150 (1963).
- 31/ Derbin Lumber & Supply Corp. v. United States, 488 F.2d 88 (4th Cir. 1973).
- 32/ Davis v. United States, 395 F. Supp. 793 (D. Neb.), aff'd 536 F.2d 758 (5th Cir. 1976).
- 33/ Some courts, in order to preserve constitutional tort claims, have felt obliged to contrive tortious state tort law analogies. E.g., Birnbaum v. United States, 588 F.2d 219 (2d Cir. 1978).
- 34/ E.g., Carlson v. Green, 446 U.S. 14 (1980).
- 35/ 28 U.S.C. §§1346(b) and 2672.
- 36/ Laird v. Nelms, 406 U.S. 797 (1972).

- 37/ There has been much academic criticism of this exclusion. See cites at Schuck, supra note 1 at 357, n.255.
- 38/ E.g., Carey v. Piphus, 435 U.S. 247 (1978).
- 39/ 28 U.S.C. §2674.
- 40/ 15 U.S.C. §1640(a).
- 41/ For one proposal, see Comment, "Presumed Damages for Fourth Amendment Violations," 129 U. of Pa.L.Rev. 192 (1980).
- 42/ Schuck, supra note 1 at 361-67.
- 43/ 5 U.S.C. §552(a)(4)(F).
- 44/ Norton v. United States, 581 F.2d 390 (4th Cir. 1978).
- 45/ E.g., Comment, "FTCA: Liability of U.S. for Torts Committed in Good Faith by Federal Law Enforcement Officers," 63 Minn.L.Rev. 1293 (1979).
- 46/ Schuck, supra note 1.
- 47/ People v. DeFore, 242 N.Y. 13,21 (1926).
- 48/ See, Schuck, supra note 1.
- 49/ 28 U.S.C. §2412(b)-(d), Pub. L. 96-481.
- 50/ 28 U.S.C. §2412(d)(1)(A).
- 51/ 28 U.S.C. §2678.
- 52/ See William Wright, The Federal Tort Claims Act (1957) at 138.

PETER H. SCHUCK

SUING OUR SERVANTS: THE COURT, CONGRESS, AND THE LIABILITY OF PUBLIC OFFICIALS FOR DAMAGES

... it is mentioned, that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down 40 wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt. [*Respublica v. Sparhawk*, 1 Dall. 357, 363 (Pa. Sup. Ct. 1788)]

To pose the question of the appropriate scope of official immunity¹ is one way to ask how we wish to govern ourselves. For some, the issue of immunity is not difficult to resolve. The rule of law requires that officials be bound by the rules that a democratic society has imposed upon its public servants no less than upon its other members.

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¹ The terms "official immunity" or "official liability" refer to the immunity or liability attaching to individual government officials in damage actions brought against them in their individual capacities for conduct taken within the scope of their employment. The terms "governmental immunity" or "governmental liability" refer to that attaching to federal, state, or local governments in damage actions brought against them.

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Any just legal system aspires to remedy every significant wrong; those injured by officials violating established legal standards should be made whole. Officials obliged to pay for their transgressions and errors will be more law-abiding, advertent, and respectful of the citizenry. But the scale has another balance, for other social interests and values are at stake than those of holding officials accountable to law, of remedying and compensating injury, and of deterring governmental wrongdoing, fundamental as those purposes are.

The concern must also be with the process of governing, a process in which fallible human beings make countless complex judgments about ill-defined, conflicting, and important social interests committed by law to their protection. These judgments must frequently be made on the basis of poor information and little opportunity for reflection. Under such circumstances, a decision maker with a heightened consciousness of the risk of liability for error may respond in ways that elevate personal interest above official duty, supplanting one type of error with another in an effort to insulate himself from accountability. A remedy designed to compensate victims and deter official illegality might in fact defeat some important social objectives and ignore others. Such a remedy might spawn new injustices less visible and thus less tractable.

These are problems for any society. They are especially urgent for a liberal one, congenitally and profoundly suspicious of governmental power, but which has entrusted ever more authority and decisional initiative—the initiative to injure as well as to assist—to public officials. Some of these problems cannot readily be resolved. The answers turn in part upon empirical data that are unavailable. They concern fundamental values about which there is little social agreement.

As is often the case, however, the courts cannot defer these questions until a social consensus crystallizes. Issues of official immunity and liability have come to represent a significant fraction of

I shall use the terms "liability" and "immunity" almost exclusively in connection with actions for money damages. I assert that the threat of money damages in which the official faces the prospect of direct financial loss, is a more powerful determinant of behavior than the threat of injunctive or declaratory relief, in which the official may simply be obliged to behave differently in the future.

"Liability," it should be noted, is not simply the obverse of "immunity." Liability turns upon several factors in addition to immunity, such as jurisdiction over a defendant, the existence of particular remedies, etc.

the workload of the federal judiciary.² Within the last three years, the Supreme Court has responded to these pressures by cutting a wide swath through the field of official and governmental immunity and liability, utterly transforming it in the process. During the 1977 Term alone, the Court both truncated the scope of immunity available to federal officials in suits to remedy alleged constitutional violations³ and extended the reach of those remedies to new categories of defendants.⁴ In the 1978 Term, the Court recognized the existence of a damage remedy against a Member of Congress,⁵ thereby signaling its willingness to extend the ambit of remedial innovation well beyond the frontier established earlier in *Bivins v. Six Unknown Named Agents*.⁶

² In 1978, civil rights suits (including prisoner petitions) comprised over one-third of the private-federal question caseload in the federal courts. 1978 ANNUAL REPORT OF ADMINISTRATOR OF U.S. COURTS at A16-A17 (1978). This fraction does not include suits against the Government under the Federal Tort Claims Act, or against officials at common law, or under non-civil-rights statutes.

Unfortunately, the collected data are too highly aggregated to tell us much about the *dramatis personae*. We do know, however, that the number of "civil rights statute" cases filed (including actions under § 1983) has grown enormously, from 280 in 1960 to 3,985 in 1970 to 13,168 in 1979. Newman, *Suing the Lawbreakers*, 87 YALE L.J. 447, 452 (1978); 1979 ANNUAL REPORT OF ADMINISTRATOR OF U.S. COURTS A14. If prisoner petitions under civil rights laws are included, the 1979 total reaches almost 25,000, including suits relating to voting rights, employment, public accommodations, welfare, and "others," but it is not broken down into more discrete categories. Nor does it distinguish actions for damages from suits for injunctive or declaratory relief, or actions against individuals from those against governmental entities. See *Maine v. Thiboutot*, 100 S. Ct. 2502, 2515 n.16 (1980) (Powell, J., dissenting). Moreover, "several thousand" nonstatutory, *Bivins*-type actions, see note 6 *infra*, have reportedly been brought. See Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. LEGISL. 1 (1978). No comprehensive survey is available to indicate the particular categories of officials sued most often, although a recent study does reveal a dramatic surge in § 1983 filings by prisoners. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 611-12 (1979) (9,730 cases filed in 1978, not counting *habeas corpus* petitions; in 1977, § 1983 filings exceeded *habeas corpus* filings for the first time). See also AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, IMPACT 2 (1980) (private survey of actions against police personnel suggesting—although the report is difficult to interpret—that volume of civil rights actions in federal court against police officers more than tripled between 1970 and 1976). Finally, these data ignore actions brought under § 1983 in state courts, e.g., *Thiboutot*, *supra*, but probably these are not numerous.

³ *Butz v. Economou*, 438 U.S. 478 (1978).

⁴ *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

⁵ *Davis v. Passman*, 442 U.S. 228 (1979). The Court explicitly reserved the question of Speech-or-Debate-Clause immunity for such a defendant. *Id.* at 249.

⁶ 403 U.S. 388 (1971). During the 1978 Term, the Court also denied immunity to a regional agency created by interstate compact. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In a contraction of liability that is rare in recent years, however, the Court conferred absolute immunity under § 1983 on individual members of the agency to the extent that they were acting "in a capacity comparable to that of members of a state legislature." *Id.* at 1180.

It was the 1979 Term, however, that most dramatically expanded judicially sanctioned official and governmental liability. During that Term, the Court: (1) deprived municipalities, which had earlier been declared wholly immune from damage actions for violation of constitutional and civil rights laws,⁸ of any governmental immunity from such suits;⁹ (2) implied a damage remedy by inmates against federal prison officials for violations of the Eighth Amendment, despite the availability of a remedy against the government for such violations under the Tort Claims Act;¹⁰ (3) suggested that the highest court of a State and its chief justice could, under certain circumstances, be liable for attorneys's fees, as well as be subject to declaratory and injunctive relief, for constitutional violations;¹¹ (4) held in effect that in a suit under 42 U.S.C. § 1983, determination of the causal nexus between the State's allegedly unconstitutional action and plaintiff's injury is not limited by state tort law principles;¹² (5) ruled that the burden of pleading immunity in a § 1983 suit must be borne by the defendant official;¹³ (6) held that defense counsel appointed in a federal criminal proceeding pursuant to federal statute cannot claim any "official" immunity under federal law in a malpractice action growing out of it;¹⁴ (7) denied any evidentiary privilege based upon official immunity to a state legislator prosecuted for criminal violations of federal law;¹⁵ and (8) interpreted § 1983 to cover not only constitutional and civil rights violations but violations of other (presumably all) federal laws.¹⁶ The overwhelming effect of these decisions

⁷ For all this, the potential scope for further expansion of official and governmental liability has not been exhausted. Indeed, I propose herein further expansion of governmental liability.

⁸ See *Monroe v. Pape*, 365 U.S. 167 (1961).

⁹ *Owen v. City of Independence, Mo.*, 100 S. Ct. 1398 (1980).

¹⁰ *Carlson v. Green*, 100 S. Ct. 1468 (1980).

¹¹ *Supreme Court of Virginia v. Consumers Union*, 100 S. Ct. 1967, 1978 (1980).

¹² *Martinez v. California*, 444 U.S. 277, 285 (1980). Although the nexus in *Martinez* was found "too remote," *id.* at 285, cutting that determination adrift from state law may ultimately effect an expansion, rather than a contraction, of official liability.

¹³ *Gomez v. Toledo*, 100 S. Ct. 1920 (1980). The location of the burden of persuasion remains an open question. *Id.* at 1924 (Rehnquist, J. concurring).

¹⁴ *Ferri v. Ackerman*, 444 U.S. 193 (1979).

¹⁵ *United States v. Gillock*, 100 S. Ct. 1185 (1980).

¹⁶ *Thiboutot*, 100 S. Ct. 2502. Under this decision, coverage may also possibly extend to violations of federal regulations and common law.

as a whole, has been to expand official and governmental liability, while narrowing official and governmental immunities. These decisions delineating the scope and character of official and governmental liability and immunity inevitably advance or frustrate a number of discrete but interrelated social goals. The goals include: compensating victims of official misconduct (the "compensation objective"); discouraging official illegality (the "deterrence objective"); encouraging officials to execute their duties in decisive, selfless, and socially beneficial manner (the "vigorous decision-making objective"); the shifting of loss to a larger number of people (the "loss-spreading objective"); the reinforcement of community sentiments concerning the morality of certain behavior (the "moral affirmation objective"); and wealth redistribution (the "wealth redistribution objective"). These objectives frequently conflict with one another. For example, so long as socially desirable activities may occasionally go awry and injure others, a requirement that the actor compensate the victim will to some extent deter those activities, however beneficial they may be.

In my view, the Court's recent decisions are far less likely to minimize these "objectives" than certain alternative structures that could be fashioned. In particular, I maintain that by expanding the circumstances under which public officials may be sued or may be personally liable in damages, these decisions may well produce less compensation, less deterrence of illegality, less vigorous decision-making, less loss spreading, less moral affirmation, and less efficiency than a legal regime expanding governmental liability and restricting official liability.

I assert that the Court's recent decisions in this area constitute problematic public policy. Most fundamentally, its vast expansion of official liability has failed adequately to consider the implications for the decision-making environment and incentive structure confronting the kind of public officer with whose conduct these rules ought to be particularly concerned—the "street-level" official. His environment is characterized by pervasive uncertainty concerning what behavior is correct, a relatively high probability of error and potential for public harm, and unusually great opportunities for behavior that minimizes the risks to his personal interests. He faces incentives that encourage him to exploit any opportunities to minimize such risks even—or perhaps especially—when substantial public interests are sacrificed in the process. He also faces

significant uncertainties concerning the availability to him either of immunity or of devices to shift risks to others. As a result, the official's caution is likely to assume proportions that can reduce his willingness to pursue the objectives that his agency is required to advance.

That the Court no longer appears, except at a rhetorical level, to attach much weight to this possibility reflects both its preoccupation with two other objectives, compensation and deterrence of illegality, and its unexamined premise that the present structure of liability-immunity rules actually achieves those objectives. In fact, this structure appears to frustrate each of them, especially when compared to possible alternative regimes, such as expanded governmental liability. In short, improvement over the *status quo* is attainable.

Withal, if there is a villain in the piece, it is surely Congress, not the Court. Congress is the only institution capable of designing the comprehensive legal and administrative apparatus adequate to the complexity of the problem, yet it has essentially abdicated its policymaking responsibilities in this area.¹⁷ Indeed, the Court's approach can sensibly be viewed as a heroic effort to fashion a just system of incentives and deterrents in the face of chronic legislative inaction.¹⁸ The Court, in this view, has fashioned a respectable

¹⁷ 42 U.S.C. § 1983 was enacted 110 years ago. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, was adopted thirty-five years ago, and was amended in 1974 in the wake of *Bivens*. Neither has received a comprehensive congressional review, or even reexamination in light of the Court's recent decisions in this area. Nor, despite significant social, political, and legal changes in the almost two centuries since the adoption of the Eleventh Amendment has Congress acted to adjust the relationship between the immunity of States and the rest of the emerging legal regime surrounding immunity-liability rules.

¹⁸ There have been legislature efforts to remedy deficiencies of *Bivens*, § 1983, and the FTCA, with little result. The FTCA was amended in the wake of *Bivens* to provide a governmental defendant for a narrow range of intentional torts committed by law enforcement officers. A more wide-ranging effort, however, began as early as 1973 to incorporate constitutional torts generally into the FTCA, while reducing the exposure of individual officials and giving plaintiffs alternative channels to seek corrective agency action. This effort has failed repeatedly. See Beil, note 2 *supra*; see also Hearings on Amendment of the Federal Tort Claims Act before the House Committee on the Judiciary, 96th Cong., 1st Sess. (1979) (hereinafter 1979 House Hearings); Hearings on Amendments to the Federal Tort Claims Act before Subcommittees of the Senate Judiciary Committee, 95th Cong., 2d Sess. (1978) (hereinafter 1977 Senate Hearings); Hearings on the Federal Tort Claims Act before the House Judiciary Committee, 95th Cong., 2d Sess. (1978) (hereinafter 1977 House Hearings). In the 95th Congress, different versions of a bill were approved by subcommittees of both Houses, but got no further. In the 96th Congress, the legislation has not emerged from subcommittee in either House. S.35, introduced by Senator Mathias, in the 95th Congress, proposed a variety of changes in the § 1983 cause of action, primarily intended to eliminate roadblocks to recovery. Hearings were held but no action was taken. See Hearings on the

legal artifact given the crudeness of the tools available to it.¹⁹ Moreover, by magnifying the anomalies of this ineffective and often unjust system, the Court's effort could stimulate a rationalization and strengthening of that system.²⁰

I

The law of official and governmental immunity today is an eclectic artifact, an alloy of doctrines created by the melding of three central elements: tort law, administrative law, and constitutional law. Indeed, the evolution of immunity doctrine represented in the Court's recent decisions cannot be understood apart from these, its principal sources. As each of these sources has been shaped and refined by the tension between the conflicting values that its doctrines are intended to advance and accommodate, their fusion in the form of immunity rules has further diversified these competing concerns. The resulting doctrine has not simply exacerbated their inherent tensions; it has deepened the complexity of the underlying policy issues whose resolution is required.

Tort doctrine has exhibited powerful tendencies during recent decades to advance the social objectives of compensation, loss spreading, and deterrence of illegality, sometimes at the expense of vigorous decision making and moral goals. This direction, if not as pronounced in actions against the federal government under the Tort Claims Act,²¹ is unmistakable,²² and the Court has ratified it in its public law decisions.

The Court has been timid, however, in adopting other important manifestations of this change in private tort law: the expansion of

Civil Rights Improvements Act of 1977, before the Subcommittee on the Constitution of the Senate Judiciary Committee, 95th Cong., 2d Sess. (1978). Several of the major provisions of the bill were subsequently obviated, however, by the decisions in *Monell*, 436 U.S. 658, and *Owen*, 100 S. Ct. 1328.

¹⁹ Thus, the Court has moved dramatically in recent years toward a system of enterprise (governmental) liability in the one area—municipal liability—in which constitutional and statutory barriers to such a reform did not exist.

²⁰ Its recent decisions could, for example, encourage Congress to adopt changes such as those that I propose, or encourage state legislatures to expand governmental liability for official misconduct.

²¹ 28 U.S.C. §§ 2674-80. See, e.g., *United States v. Kubrick*, 444 U.S. 111 (1979) (medical malpractice); *Laird v. Nelms*, 406 U.S. 797 (1972) (strict liability).

²² See, e.g., *Griffin v. United States*, 500 F.2d 1059 (3rd Cir. 1974) (release of defective vaccine); *McGarry v. United States*, 549 F.2d 587 (9th Cir. 1976) (death of private contractor's employee).

enterprise liability and of vicarious liability, especially *respondeat superior*. Common-law courts and commentators have viewed these doctrines as facilitating the imposition of liability upon the person or entity best situated by reason of size, insurability, control, or otherwise to minimize the total costs attributable to a harm, costs of preventing the harm as well as those of sustaining it.²³ That locus of liability is thought to advance society's interest in striking the appropriate balance between goals of vigorous decision making and deterrence of wrongdoing. It may also advance compensation, loss-spreading, and wealth distribution objectives as well.²⁴

The reasons militating in favor of enterprise liability²⁵ in the domain of private law are in fact far more powerful and compelling in the realm of public law. Until quite recently, however, the Court managed to resist these arguments. Beginning at least as far back as the *Bivens* decision in 1971, the Court has steadily expanded official liability and narrowed official immunity without regard to whether or not a government entity would ultimately bear the loss.²⁶ *Monell* began to broaden the enterprise liability of government, but only in a limited fashion. Even after *Owen*, that liability remains cabined in important respects, being limited to municipalities that violate civil rights through their official policies. The Court's failure to embrace enterprise liability in the public law domain may reflect its deference to Eleventh Amendment immunity of state governments, and the immunity of the federal government that Congress has preserved by severely limiting the FTCA's reach. If the legal rules applicable to "official torts" are to enter the mainstream of contemporary tort doctrine, then, Congress will probably have to place them there.

In contrast to its equivocal affirmation of modern tort law, the Court's jurisprudence concerning official and governmental liability and immunity is wholly congruent with and supportive of the central tendency of administrative law to legitimate and effectuate

²³ See FRANKLIN, *INJURIES AND REMEDIES: TORT LAW AND ALTERNATIVES* 386-91 (2d ed. 1979).

²⁴ See FRANKLIN, note 23 *supra*; 2 HARPER & JAMES, *THE LAW OF TORTS* 1370-74 (1956; 1968 supp.).

²⁵ Since the difference between enterprise liability and liability pursuant to *respondeat superior* is practically nonexistent where a government entity is the defendant, I refer hereafter only to the former.

²⁶ *E.g.*, *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975), *on remand*, 519 F.2d 59 (5th Cir. 1975); 454 F. Supp. 311 (N.D. Fla. 1978).

judicial influence over the exercise of bureaucratic discretion.²⁷ That this task has come to be seen as an urgent one is evidenced by numerous developments during the last decade involving all branches and levels of government and apparently enjoying broad, unflagging public support. Such developments no doubt have been shaped by a variety of complex and interrelated factors—social, political, economic, and cultural²⁸—yet they have had one common consequence. Courts have been ceded (and, occasionally, have arrogated) a central role in implementing these new controls over bureaucratic discretion and misconduct.

To impose official or governmental liability for damages is only one mechanism by which judges exercise control, but it has come to assume great importance. Not only has the volume of such actions grown dramatically in recent years, but money damages seems to

²⁷ First, judicial decisions have elaborated a kind of procedural Maginot line against bureaucratic depredations. See Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1979 SUPREME COURT REVIEW 345, 388–400; see also *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 100 S. Ct. 2844 (1980) (invalidating OSHA's benzene standard).

Second, Congress has enacted regulatory statutes evincing a suspicion of administrative discretion and a determination—through imposition of specific standards, bureaucratic deadlines, elaborate public procedures, legislative veto requirements, conflict of interest provisions, and the like—to constrain its exercise. For a discussion of this phenomenon in the context of the Clean Air Act, see ACKERMAN, *CLEAN COAL/DIRTY AIR* (1981).

Third, a spate of legislative and administrative "regulatory reform" measures have been proposed, designed to improve the quality (variously defined) of agency decision making and regulatory policy. For a compilation of these measures, see AMERICAN ENTERPRISE INSTITUTE, *MAJOR REGULATORY INITIATIVES DURING 1979* (1980); *Report on Federal Regulation and Regulatory Reform*, by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976); *Study on Federal Regulation*, by the Senate Committee on Government Operations, 95th Cong., 1st Sess. (1977).

Finally, a flourishing "public interest" movement in the nonprofit sector has emerged, encouraged by judicial decisions, by congressional enactments, and by administrative arrangements. See generally Schuck, *Public Interest Groups and the Policy Process*, 37 PUBLIC ADMIN. REV. 132 (1977).

²⁸ The widespread perception of regulatory failure, for example, appears to reflect, *inter alia*, the currency and acceptance during the 1970s of empirical and theoretical academic critiques of regulation, e.g., MACAVOY, *THE CRISIS OF THE REGULATORY COMMISSIONS* (1970); Wilson, *The Politics of Regulation*, in McKIE, ED., *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT* (1974), and a more generalized mistrust of "expertise" and "professional autonomy" claimed by persons and groups wielding decision-making power over the public, e.g., LIEBERMAN, *THE TYRANNY OF EXPERTS* (1970). Several manifestations of (and responses to) this disillusionment are the changing role of the FBI, see WILSON, *THE INVESTIGATORS* 166–82 (1978); the rise of public employee unions as an important political force, e.g., *Collective Bargaining and Politics in Public Employment*, 19 U.C.L.A. L. REV. 887 (1972), and the accession of certain "populist" critiques of public policy to the status of conventional wisdom, e.g., FELLMEH et al., *THE INTERSTATE COMMERCE COMMISSION* (1970); ESPOSITO, *VANISHING AIR* (1970). And see Weaver, *Regulation, Social Policy and Class Conflict*, 50 PUB. INT. 45 (1978); Schuck, *Review Essay*, 90 YALE L.J. No. 2 (1981).

be a more potent sanction than injunctive relief. Courts would have found ways to discourage this kind of litigation had they not viewed it as providing an effective lever to influence administrative behavior. Moreover, damage actions against officials or governmental entities for past misconduct fulfill important technical and professional requirements of courts, requirements not adequately met by direct, preenforcement review proceedings that are now commonplace features of administrative law.²⁹

In a damage action, a court is likely to feel more confident in reviewing official behavior. The concreteness of the dispute, the particularity of the claims and consequences, its historical nature, the accessibility of the critical facts, all appeal to a court's institutional strengths. Injustices, if they have occurred, will be more palpable. The effects of the court's judgment upon an agency's broad programmatic responsibilities can be limited to the particular fact situation before the court; intervention and impact may thus be rendered more surgically precise. Finally, certain kinds of official misconduct—especially low-level, isolated acts or omissions—can probably be identified and punished only by such after-the-injury remedies.³⁰

This is not to suggest the general superiority of postinjury review over preenforcement review,³¹ but rather that suits seeking to recover damages for official misdeeds fulfill several judicial objectives. They do not simply advance the value of compensation for injury or serve as ancillary "mopping-up" operations to direct judicial review of prospective agency action, but are also essential tools in their own right for performing the fundamental office of administrative law—shaping and controlling future official behavior. Ad-

²⁹ Judicial deference to agency expertise, usually sweeping, *e.g.*, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565–70 (1980), is probably at its most abject when the agency has simply promulgated general rules or guidelines before fleshing out these abstractions by applying them in particular fact situations, *e.g.*, *Toilet Goods Assn. v. Gardner*, 387 U.S. 158 (1967). Courts are understandably reluctant to stay agency action, instrumental for the achievement of congressional programmatic ends, pending completion of protracted administrative and judicial proceedings. The empirical predicate for prospective agency decisions ordinarily consists of the kind of predictive, intuitive, policy-oriented "legislative facts" that courts are ordinarily neither well equipped nor much inclined to review closely.

³⁰ This is true both as a legal matter, see, *e.g.*, *Rizzo v. Goode*, 423 U.S. 362, 378–80 (1976), and as a matter of the victim's awareness of injury on the part of victims.

³¹ That question depends upon many considerations not relevant here. For discussion of them, see the opinions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *C.B.S. v. United States*, 316 U.S. 407 (1942).

ministrative law, however, aspires to more—and here its rather fluid boundaries intersect with those of constitutional law. Quite apart from influencing the manner in which discretion is exercised, each seeks to effect an appropriate allocation of decision-making power among legislative, executive, and judicial organs of government.³² The Court's steady expansion of official liability and contraction of immunity can thus be viewed, not merely as an additional constraint upon governmental decisions lodged elsewhere, but as a fundamental redistribution of political and decisional influence—from the legislative and executive branches of state and federal governments to the federal courts.

This accelerating movement of power from state and local officials to federal officials (especially federal judges) parallels powerful vectors in constitutional law. Much of it has occurred in litigation brought under the Fourteenth Amendment or under § 1983,³³ affecting virtually every area of state and local governmental responsibility. There have been digressions from this path, of course, and its direction has occasioned a good deal of criticism.³⁴ Nevertheless, this federalizing, constitutionalizing impulse, fueled by civil rights litigation in the wake of *Brown v. Board of Education*³⁵ and by the "procedural due process" litigation that followed hard on the heels of *Goldberg v. Kelly*,³⁶ remains a powerful, perhaps irresistible one.³⁷ It is an impulse, moreover, for which the expan-

³² Administrative law's allocative function has sometimes penetrated into the individual branches themselves. Thus, the Supreme Court has disturbed the President's allocation of decisional power within the Executive Branch. *E.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (President not Civil Service Commission to determine eligibility of aliens for governmental employment). Lower courts have done so even within a single executive agency. See, *e.g.*, *NLRB v. Universal Camera Corp.*, 190 F.2d 429, 430 (2d Cir. 1951); for other cases see BREYER & STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 191 n.27 (1979).

³³ The intimate relationship between 42 U.S.C. § 1983 and the Fourteenth Amendment which it was designed to supplement is discussed in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615–20 (1979) and *Thiboutot*, 100 S. Ct. at 2508–11 (Powell, J., dissenting).

³⁴ See, *e.g.*, Glazer, *Towards an Imperial Judiciary*, 41 PUB. INT. 104 (1975); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

³⁵ 347 U.S. 483 (1954).

³⁶ 397 U.S. 254 (1970).

³⁷ See, *e.g.*, *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979); *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978); *Vitek v. Jones*, 100 S. Ct. 1254 (1980); *City of Rome v. United States*, 100 S. Ct. 1548 (1980); *Consumers Union*, 100 S. Ct. 1967.

sion of § 1983 remedies and the contraction of official and governmental immunities have been precursors, essential preconditions, and eloquent expressions. (An analogous migration of power at the federal level from Congress and the agencies to the courts has also occurred, animated in part by many of the same developments and mediated by the *Bivens*-type action, FTCA litigation, and statutory suits.³⁸)

II

Rules that impose liability or confer immunity upon officials may be justified rhetorically on the ground that they advance one or more of the social values mentioned earlier—compensation, deterrence of illegality, moral affirmation, equity, and loss spreading. But the validity of such a claim must ultimately depend on the behavioral and empirical relationships that the rule presupposes. In the case of liability rules directed at administrative officials—the principal focus here—such relationships are exceedingly opaque. No generally accepted theory of bureaucratic behavior exists (albeit not for lack of candidates).³⁹ In particular, economic models of such behavior yield few testable, nontrivial propositions. Partisans of this approach seem to agree that officials seek to maximize something, but what that something is remains elusive. Different theorists of governmental decision making tend to stress other models of behavior, each of which seems quite plausible but inevitably partial and incomplete.

This behavioral indeterminacy is not surprising, nor are its mysteries likely to yield new theoretical breakthroughs. The world of the public official is highly constrained, reflecting not merely the scarcities of resources relative to wants that confront virtually all decision making but factors peculiar (in degree if not in kind) to the environment in which the official operates, the kinds of tasks that he performs, and the nature of the objectives that he is expected to pursue.

³⁸ *E.g.*, *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Bell v. Wolfish*, 441 U.S. 520 (1979); *United States Dept. of Agriculture v. Murray*, 413 U.S. 508 (1973); *National Tire Dealers and Retreaders Assoc., Inc. v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974).

³⁹ See, *e.g.*, DOWNS, *INSIDE BUREAUCRACY* (1967); NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); SIMON, *ADMINISTRATIVE BEHAVIOR* (3d ed. 1976); ALLISON, *ESSENCE OF DECISION* (1971); STEINBRUNER, *THE CYBERNETIC THEORY OF DECISIONS* (1974).

To evaluate the efficacy of a liability or immunity rule, it is necessary to identify and to analyze those conditions that define the official's distinctive decision-making milieu. But to speak of an "official" is to speak with gross imprecision. One can no more sensibly discourse about the typical public official than about the typical American. On the other hand, official liability-immunity rules must necessarily be fashioned in broad, categorical terms if only because uncertainty as to their meaning and applicability may threaten important social interests.⁴⁰ If one is to evaluate official liability-immunity rules at all, some generalization is inescapable.

The Court has framed these rules at a very high level of generality, distinguishing only among judicial, legislative, and administrative officials. (In the administrative category, it has distinguished prosecutors from all other executive branch officials.) Such broad classifications, whatever their virtues, obscure precisely those elements of official life that are most likely to determine the official's response to—and thus the efficacy of—particular liability-immunity rules.

To analyze the Court's broad legal categories, I must address several empirical questions: First, to what kinds of officials are liability and immunity rules likely to be applied? Systematic data on this question do not exist. Impressionistic evidence suggests that the principal categories of individual defendants in § 1983 cases are police officers, prison officials, public school officials, welfare officials, and public officials *qua* employers. The principal categories in *Bivens*-type cases appear to be federal law enforcement and prison officials.⁴¹ Although their activities are obviously disparate, these most vulnerable officials share at least one attribute: they personally and directly deliver the most basic governmental services to a public that is often hostile or needy (or both), and they exercise substantial discretion in doing so.

⁴⁰ Cf. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), who maintains that in the absence of transaction costs, efficiency will be achieved regardless of the party upon whom liability is imposed. While there may be some instances in which private sector interactions roughly approximate this condition, the public sector provides few if any such situations (except perhaps for those, such as patient care by Veterans Administration physicians, in which government is performing activities wholly analogous to market transactions).

⁴¹ Suits under the FTCA exhibit a less concentrated pattern of government functions. Potential tort liability can arise in almost any activity in which the government is involved, from motor vehicle accidents to testing NASA rockets, *Pigott v. United States*, 451 F.2d 574 (5th Cir. 1971); *Griffin*, 500 F.2d 1059; *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975).

Second, what positions do these litigation-prone officials occupy in their agencies? The world of the patrolman or caseworker has little in common with that of persons who head their organizations. By understanding one, we do not necessarily understand the other.⁴² Again reliable data are lacking. (There are reasons to believe, however, that low-level officials are exposed to far greater risks of liability than their policy-level superiors.) This may seem anomalous. High-level supervisory or policy officials would appear to pose more tempting litigation targets, for they are more likely to be readily identified, financially capable of satisfying a judgment, and well positioned to change official policy. The courts, however, have evidenced considerable solicitude for high-level officials, absolving them of personal liability—even in actions seeking only injunctive relief—in the absence of direct, personal involvement in the wrongful conduct.⁴³ The Court has suggested that the scope of immunity accorded to officials should be broader as the scope of their responsibilities widens.⁴⁴ The FTCA's "discretionary function" exception implements this principle.⁴⁵ The Court's reluctance to hold higher-ups liable is further suggested by its refusal to impose § 1983 liability upon the government entity under *respondeat superior* principles. This contrasts with the evolution of private tort law, where the employer is far more likely to be sued than the employee.

In sum, the officials most susceptible to liability are not policy-level officials but their low-level subordinates, operatives who have been described in another context as "street-level bureaucrats."⁴⁶

⁴² See, e.g., WILSON, note 28 *supra*, at ch. 4; WILSON, *VARIETIES OF POLICE BEHAVIOR* ch. 2 (1968); BLAU, *DYNAMICS OF BUREAUCRACY* 213 (2d ed. 1963).

⁴³ E.g., *Rizzo*, 423 U.S. at 375-80.

⁴⁴ E.g., *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). But see *Economou*, 438 U.S. at 506 ("[T]he greater power of such officials affords a greater potential for a regime of lawless conduct"). It is interesting to note that the few occasions upon which the Court specifically discussed the distinctive nature and circumstances of official decision making has occurred in cases principally involving policy-level officials such as the Governor of a State (*Scheuer*) and the top officials in the Department of Agriculture (*Economou*). These discussions therefore beg an important question—the extent to which the analysis applicable to such officials is applicable to that of the low-level officials more typical of the defendants in § 1983 and *Bivens*-type suits. The latter may well have more in common with one another (albeit they deliver different public services) than they do with the executive-level officials in the same service.

⁴⁵ 28 U.S.C. § 2680(a).

⁴⁶ LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 3 (1980). Lipsky includes in this category types of officials often sued under § 1983 and

Their distinctive work setting, perception of risk, and relative vulnerability account for the peculiar poignancy of the conflicting values underlying official immunity-liability doctrine and the pronounced complexity of the policy judgments that must ultimately justify that doctrine. Accordingly, I consider such rules as they apply to these street-level officials, and more particularly to those who perform tasks that (unlike, say, Postal Service drivers or Veteran's Administration doctors) have no close analogue in the private sector: the policeman on the beat, the public school teacher or principal, the welfare or social service caseworker, the safety inspector, the administrator of a public mental hospital, the FBI agent, and the like.⁴⁷ Whether and to what extent the analysis that follows is applicable to higher-level officials is an important question but one that is not pursued here.

A. THE WORKING ENVIRONMENT OF THE STREET-LEVEL OFFICIAL

The literature on the sociology of public organizations holds that the behavior of those organizations and of their agents is determined less by the explicit goals of the organization or by the rules that it fashions to implement those goals than by the nature of the tasks that those agents perform and the incentive systems that develop around those tasks.⁴⁸

Professor James Q. Wilson has observed that, despite constant turbulence in organizational structure, leadership, legal rules, administrative controls, and public attitudes, the contours and character of the tasks that street-level officials perform are remarkably stable. Official tasks, Wilson maintains, "are to an important degree the most enduring, hard-to-change elements of the situation; administrative procedures must adapt to tasks, not the other way

Bivens, including law enforcement personnel, social workers, judges, legal aid lawyers, court officers, health workers, welfare workers, and the like.

⁴⁷ Most public street-level functions do not have private counterparts that are even superficially analogous. More important, most street-level services that are the subject of § 1983 and *Bivens*-type actions that are also sold in private markets, such as education or security, are delivered in a different decision-making context than their public sector counterparts—to different kinds of people (e.g., higher income), under different conditions of selection (e.g., consensual), pursuant to compensation and other arrangements that reflect the willingness of the provider to assume risks, and subject to fewer external constraints. These differences are, or ought to be, highly relevant to appropriate immunity-liability rules.

⁴⁸ E.g., WILSON, note 28 *supra*, at ix; LIPSKY, note 46 *supra*, at 156; KAUFMAN, *THE FOREST RANGER* (1960); BLAU, note 42 *supra*, at chs. 1–5.

around."⁴⁹ Yet if that adaptation is difficult for any organization, it is especially so for public agencies because, to a far greater degree than private organizations, their behavior is constrained and shaped by dependency upon their political environment and by the problematic nature of their ends. Of all public agencies, those performing street-level tasks are most profoundly influenced by these forces.

There are seven aspects of the working environment of the street-level official that are distinctive in the sense that they tend to differ in significant degree, sometimes amounting to a difference in kind, from the environment in which their agency superiors and private low-level employees make decisions.⁵⁰ The private decision-making context is the most important and relevant comparison. It is the decisional context to which traditional tort liability rules have been primarily directed. It is also the one from which the Court, in its steady expansion of official liability and contraction of official immunity, seems increasingly to draw inspiration. Finally, perhaps ironically, private decision making is the context in which enterprise liability, largely eschewed by Congress and the Court in the context of public law, has flourished. This analysis challenges the Court and especially Congress, then, to justify a set of liability-immunity rules that adopts the language of private tort law when subjecting more and more officials to the risk of liability, while apparently finding that tongue unintelligible in the context of enterprise liability of government.

1. *The character of official interactions with the public.* It is the nature of street-level work that its practitioners interact constantly with individual citizens,⁵¹ either as "clients" or as targets of the

⁴⁹ WILSON, note 28 *supra*, at 8; see also LIPSKY, note 46 *supra*, at 184.

⁵⁰ WILSON, note 28 *supra*, at 15, 163-64; LIPSKY, note 46 *supra*, *passim*. That private corporations also have difficulty controlling conduct by employees is evident.

⁵¹ It may be argued that the characteristics of the street-level official's working environment are only aspects of his *organizational* milieu, and that these aspects influence employee behavior in ways that do not importantly differ from behavior patterns characteristic of private organizational environments in the private sector. But the fact that the large public agency and large private firm each experiences systematic difficulties in effecting communication of information and norms, in monitoring and controlling employee discretion, in dealing with uncertainty, and in bringing organizationwide rationality and subgroup rationality into harmony, compare e.g., WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* ch. 7 (1975); Coase, *The Nature of the Firm*, in *READINGS IN PRICE THEORY* 331-51 (1952) (private organizations), with KAUFMAN, note 48 *supra* (public organizations) and WILSON, note 28 *supra*, is not inconsistent with the fact that

laws that those officials enforce. This daily experience contrasts sharply with that of their agency superiors and often generates in the operative a radically different view of the task.⁵² Because the street-level official has abundant opportunities to act upon his own view, the possibilities of disjunction between agency goals and employee behavior are especially great.

In addition to their frequency, the values and interests at stake in these interactions are typically quite significant—for the citizen, physical security, a sense of dignity, protection from personal harm, and access to the necessities of life as well as other benefits of the welfare state; for the official, performance of official duty and public service, personal safety and well-being, professional respect, and the display of authority. This imparts to the encounter an intensity, a commitment to vindication of one's position, that vastly complicates the interaction.

Finally, these contacts are often nonconsensual. This contrasts with virtually all situations addressed by private law, where potential injurers and victims can usually avoid one another and come together only when each perceives some mutual advantage in doing so.⁵³ Nonconsensuality reflects the coercive powers, both formal and informal,⁵⁴ of public officials. The functions that street-level officials discharge tend to be those that only government can and does perform.⁵⁵ In such cases, official and citizen usually deal with

these problems tend to be more pronounced in public organizations and that certain aspects, such as the constant interaction with a hostile or needful population, political constraints, and problematic goals, are distinctive, in degree or in kind, from public organizations. See, e.g., DOWNS, note 39 *supra*, at 29–31; LIPSKY, note 46 *supra*, at 40–70. Consider the difficulty that both private and public organizations have in maintaining discipline over the conduct of low-level employees. Certain features peculiar to public, street-level bureaucracies, such as a civil service system and politically powerful congressional committees sensitive to employee interests, greatly exacerbate these difficulties of control beyond those typically experienced by even the small minority of private firms that are unionized. The point at which differences of degree become differences in kind is, of course, a question of judgment that need not be resolved here. My argument is quite consistent with the existence of "irrational" elements in private organizations. See also BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1938); WILLIAMSON, *supra*.

⁵² In *Scheuer*, the Court noted that the police are the officials most frequently and intimately involved with the citizenry. 416 U.S. at 244–45. It took this fact as support for its rule that a qualified immunity sufficed to protect the effective functioning of such officials. But at the very least, this fact cuts both ways on that issue.

⁵³ See, e.g., LIPSKY, note 46 *supra*, at 23–25; BLAU, note 42 *supra*, at 124–25.

⁵⁴ See, e.g., Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. BAR FOUND. RES. J. 87.

⁵⁵ For an analysis of some of the less obvious ones, see Reich, *The New Property*, 73 YALE L.J. 733 (1963).

one another simply because there is no alternative. This implies both that the citizen (because he has no real exit option) will have a strong incentive to voice his grievances⁵⁶ and that the official (because the citizen may be politically weak) will be less likely to seek to accommodate him.⁵⁷ Many encounters, such as those between policeman and suspect, mental hospital staff and patient, or teacher and student, may not only reflect but exacerbate deep antagonisms, resentment, fears, or even violent behavior. The result is likely to be a persistent threat of conflict,⁵⁸ a mutual suspicion, and the ubiquitous risk of litigation.

2. *The goals of official conduct.* The ends to which street-level officials are directed—the maintenance of order, the enforcement of law, education, family stability, public health, rehabilitation of offenders, care of the ill, and the like—are often irreducibly ambiguous, difficult to operationalize or measure,⁵⁹ diverse, and conflicting. Our ability to evaluate the extent to which these goals are attained is limited; our knowledge of techniques to accomplish them is fragmentary and rudimentary—and likely to remain so.⁶⁰ In an important sense, we come to “know” and “hold” these goals only in the process of actual, concrete decisions that define the terms of trade between them, and between these goals and the means needed to attain them.⁶¹ That process of definition is instinct with the potential for controversy and misunderstanding and deprives the official, his superiors, and the public of clear benchmarks against which his performance can be measured, appraised, and legitimated. In this respect, “maintaining order,” “educating students,” and “stabilizing troubled families” are not like producing widgets, selling cars, or even practicing medicine. Policemen, teachers, and social workers can more easily be accused

⁵⁶ See HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970); but see LIPSKY, note 46 *supra*, at 13–18.

⁵⁷ See, e.g., LIPSKY, note 46 *supra*, at 55–56; BLAU, note 42 *supra*, at ch. 6.

⁵⁸ For several illuminating examples of the complexity and obstacles to self-awareness inherent in such relationships, see BURT, *TAKING CARE OF STRANGERS* chs. 2, 3 (1979).

⁵⁹ This characteristic reflects not simply the strong objective element in definitions of these goals, but the difficulty in obtaining political consensus as to their content at any but a high level of generality.

⁶⁰ AARON, *POLITICS AND THE PROFESSORS* (1970); WILSON, *THINKING ABOUT CRIME* (1975).

⁶¹ LINDBLOM, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* (1963).

of selecting the wrong means or defining the wrong ends. Such accusations will often be plausible and—in the absence of clear-cut, standardized technologies in which the official can find refuge—difficult to overcome.

3. *The official's obligation to act.* Conventional tort doctrine, upon which official liability rules largely rest, posits the autonomous individual—free to act, to delay acting, to act in one way rather than another, or to refrain from acting altogether. The choice is his, based upon his personal perceptions and calculus of costs and benefits. Liability rules are designed to influence that calculus, to bring individual self-interest into harmony with the interests of the larger society.⁶² When his self-interest counsels inaction, society requires that he act only in those relatively rare instances in which failure to act will result in harm that society finds intolerable, usually because it is avoidable at very low cost.⁶³ If he is an employee in a private firm, an obligation to act may be imposed by his employer but almost never by the law. Any liability for such acts will almost certainly fall on the enterprise, not the employee, who is rarely sued directly or subjected to an indemnity claim. Moreover, compensation can be demanded by the firm or the employee before any additional risk to either is undertaken.

None of these premises accurately describes the decisional context of an official. He is directed to act not for himself but for a diffuse principal known as "the public." When he errs, his employer frequently cannot be sued. When he is held liable for acting within the scope of his employment, even when acting without malice, he ordinarily cannot be indemnified without benefit of statute: such statutes often do not exist or provide for important exceptions. (Far from being free to remain passive when that seems the wisest course, the official is often, perhaps usually, under a legal duty to act.) He is obliged to respond to calls for help and arrest lawbreakers, to care for mental patients who need treatment and release those who do not, to remove children from their families when they are in danger and help them in their homes when they are not, and so on. For such officials, the Court has observed, even

⁶² Tort law does occasionally impose a duty to act, but it is rarely done without benefit of statute. See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUDIES 151 (1973) (on the Good Samaritan doctrine).

⁶³ But see 12 Vt. Stat. Ann. § 519 (Supp. 1971). Such impositions, of course, raise profound moral issues. See, e.g., Epstein note 62 *supra*.

vacillation entails "the risk that action deferred will be futile or constitute virtual abdication of office."⁶⁴ Moreover, when the official acts, he must often do so coercively,⁶⁵ thereby increasing the probability of harm, conflict, and litigation. Finally, agency budgets are unlikely to be increased to compensate for action-related risks; the official may demand additional compensation for undertaking them, but civil service wage schedules are far too categorical and rigid to respond adequately. Realistically, his options are to quit or to avoid risk, perhaps by shirking his duty.

The reasons for imposing this duty may be better understood by contrasting society's view of official inaction with its view of private inaction. Once it frames a liability rule, society ordinarily leaves to individuals the decision as to whether or not to act because, in a sense, society is indifferent to the outcome; whichever option is exercised, that decision ordinarily will not adversely affect interests of others that society is prepared to protect.⁶⁶ Others may prefer that an individual act, and they may be willing to compensate him for doing so. But if in pursuit of his self-interest he refrains from acting, substitutes for his action will generally be readily available. Public officials, however, are charged with advancing precisely those interests and purposes that, for a variety of reasons, will not be fully represented in the decisions of autonomous, self-interested individuals whether or not to act. When officials fail to act, alternative actions capable of advancing those interests will not ordinarily be available.

In addition, the "opportunity costs"—the benefits that choices foreclosed by a decision would have yielded—tend to be greater in the case of official inaction than private inaction. When an individual decides not to act, he may sacrifice important values. That decision, however, implies that, on balance, he valued inaction more, and, because predominantly private interests are at stake, we presume that he is in the best position to strike the balance. Officials, however, are commissioned to act in precisely those situations

⁶⁴ *Scheuer*, 416 U.S. at 246.

⁶⁵ As Professor Mashaw puts it, "the law . . . sometimes tells the official that a failure to injure—that is, to coerce compliance with a predetermined rule of conduct—is a dereliction of official duty." Mashaw, *Civil Liability of Government Officers: Property Rights and Official Liability*, 42 L. & C.P. 8 (1978).

⁶⁶ See HOLMES, *THE COMMON LAW* 77 (Howe ed. 1963) ("[T]he public generally profits by individual activity").

that tend to implicate delicately balanced public values. This special delicacy reflects the uniqueness and importance of the ends that official action is alone capable of securing, the difficulty of measuring those values in conventional economic terms, and the large number of principals whose interests are within their charge. Thus, the sacrifice of public values implicit in an official decision—to act, to refrain from acting, or to act in a particular way—is especially great.⁶⁷ Under these circumstances, society is understandably reluctant to leave such decisions either to the paralyzing ambivalence of officials or to their untrammelled discretion. The dilemma, of course, is that the conditions that make it necessary to impose a duty to act are frequently those that make it difficult or impossible to specify the content of that duty and to circumscribe official discretion.

Finally, even if the competing values were not in delicate equipoise, the radical disjunction between society's evaluation of the benefits and costs associated with alternative courses of conduct, and the official's evaluation, implies that society cannot count upon the official to make the socially desirable choice—either the choice between action and inaction or that between action of one kind and action of another. It must, therefore, impose a duty to act.

4. *The risk of harm from official decisions.* The legal obligation to act, especially in the contexts in which street-level officials function, frequently amounts to an obligation to create a high probability of harm to innocent persons. This springs not simply from the number of citizens whom their behavior affects, and the importance of the social values advanced by vigorous law enforcement, by care of the needy and dependent, by inspection and regulation of dangerous products and conditions, by instruction of the young, by safeguarding of public health, and by other public functions. It

⁶⁷ So "close" are many of these decisions that officials who pass just over the line into the realm of illegality may feel little remorse; indeed, such transgressions will often seem justified even to the law-abiding official. See BURT, note 58 *supra*, at 135-36. The police officer who makes an illegal search of one who, but for the exclusionary rule, would have been convicted, has advanced some important social values—for example, the apprehension, detention, and (possibly) deterrence of one who has committed a crime—even as he has flouted others that arguably override the former.

For an elaboration of some of the psychological and moral tensions that underlie such justification-in-the-face-of-illegality, see *id.* at 133-35. See also, Wilson, note 42 *supra*, at 206-12; Schnepfer, *Civil Rights Litigation after Monell*, 79 COLUM. L. REV. 213, 253 (1979); LIPSKY, note 46 *supra*, at 18, 187, and chs. 7-10; SYKES, *THE SOCIETY OF CAPTIVES* ch. 3 (1958); BLAU, note 42 *supra*, at chs. 2-3.

derives also from the legitimation of coercive authority that their office entails.⁶⁸ When an official acts illegally or erroneously, the injury to individuals and to society will often be grievous.⁶⁹

Moreover, virtually all official courses of action (or inaction) will make someone worse off as a result.⁷⁰ When a school official disciplines a student, he may do so unjustly; when he fails to impose discipline, he may impair the learning opportunities of many others. When a police officer makes an arrest, he may violate the rights of the arrestee; when he fails to arrest, he may neglect the interests of the victim and of society generally. When an official fires a subordinate, he may do so without adequate cause; when he fails to fire, he may encourage incompetence, destroy morale, and injure the taxpayer. The risks of being sued for choosing one course of action rather than the other are not equal. Remedies are strongly biased in favor of the highly visible victim. Officials can respond to this risk, of course, by quitting or by contriving somehow to avoid or minimize it—even if that means neglecting their duty. Private firms, employees, or individuals, as noted above, typically have additional options.

5. *The risk of official error.* All decisions, of course, are subject to error. Several conditions characteristic of street-level official decisions, however, significantly magnify that risk. First, many must be made quickly, often instantaneously, with respect to events occurring in "real time" rather than retrospectively.⁷¹ The obligation of inspectors and law enforcement officials to intervene as soon as a violation is detected, the massive caseloads of most client-oriented officials, the emergency nature of many public services—these factors assure that the time available for considering a particular

⁶⁸ The Court made precisely this point in *Bivens*: "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392; see *id.* at 394–95.

⁶⁹ See HARRIS, *FREEDOM SPENT* (1974); LIEBERMAN, *HOW THE GOVERNMENT BREAKS THE LAW* (1972).

⁷⁰ The fact that some decision situations render more identifiable winners and losers—traditional adjudication and "pork barrel" allocations are examples—should not blind us to the existence of the less obvious ones. For other examples, see Epsiein, note 62 *supra*, at 158. The Court missed this point. In denying absolute immunity to executive officials but granting it to judges, on the ground, *inter alia*, that judicial acts ordinarily create losers. Executive decisions also do so and often with equal or greater clarity.

⁷¹ See, e.g., LIPSKY, note 46 *supra*, at 29–30; BARDACH & KAGAN, *THE INSPECTORATE* ch. 2 (1981).

decision will be inadequate given the importance of the values at stake.

Second, such decisions must often be made on the basis of little information. What information there is will frequently be of low quality. Improving it will be costly, and there will probably be no time even to consider whether doing so would on balance be worthwhile.⁷² Notwithstanding these deficiencies, however, strong legal, professional, and moral norms demand that public officials render their decisions according to the individual circumstances of citizens rather than on the basis of broad generalizations,⁷³ an ethic that requires a quantity and quality of information that is simply unavailable to most officials.⁷⁴

The availability of a "qualified immunity" to street-level officials is a recognition of these constraints, among others, and is intended to protect them from liability for having acted in good faith on the basis of "all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."⁷⁵ Unfortunately, this defense is unlikely to neutralize the effects upon the official of often having to act in ignorance.

6. *Rules and official discretion.* Conventional tort doctrine requires very little of the individual. In general, he need only behave as a reasonable person in such circumstances. No special knowledge, insight, or capacity is ordinarily required: mistakes in judgment are tolerated if they are reasonable.⁷⁶ He is presumed to know the law, but the law ordinarily has nothing to say concerning the courses of action that he typically considers, save for a soft voice whispering "behave reasonably, nothing more."

The public official, in contrast, is usually subject to—and required to administer—a plethora of rules.⁷⁷ These rules, while providing some guidance for action, are often so voluminous, ambiguous, contradictory, and in flux that they can only be complied

⁷² E.g., LIPSKY, note 46 *supra*, at 29–31, 85; WILSON, note 42 *supra*, at 18.

⁷³ See, e.g., *O'Connor*, 422 U.S. 563; *Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland v. LaFleur*, 414 U.S. 632 (1974).

⁷⁴ See LIPSKY, note 46 *supra*, at 85.

⁷⁵ *Scheuer*, 416 U.S. at 247.

⁷⁶ If anything, tort law disadvantages one with above-average skills and training. HARPER & JAMES, note 24 *supra*, at § 16.6.

⁷⁷ See, e.g., LIPSKY, note 46 *supra*, at 14–16; SYKES, note 67 *supra*, at 23; BLAU, note 42 *supra*, at 123.

with or enforced selectively.⁷⁸ In short, officials are actually awash in discretion. Indeed, street-level decision making is distinctive in that the lower the official's position in the agency hierarchy, the less helpful the rules⁷⁹ tend to be and the more *de facto* discretion he enjoys—reversing the pattern of distribution of discretion in most other organizations, including many public agencies that do not exercise street-level functions. This inverse relationship between organizational position and level of discretion characterizes not only police officers but teachers, welfare workers, prison guards, and other street-level workers. It primarily reflects the complexity of their tasks, their freedom from observation by superiors, and the absence of objective performance criteria.⁸⁰ The breadth of this discretion provides opportunities for risk-minimizing conduct that have important implications for the efficacy of existing immunity-liability rules.

7. *Political, institutional, and resource constraints.* If street-level officials are, by reason of their discretion, markedly free of control by their supervisors, the same cannot be said of their relationship to

⁷⁸ LIPSKY, note 46 *supra*, at 14.

⁷⁹ See, e.g., WILSON, note 28 *supra*, at 161–62.

⁸⁰ Supervisors and policy-level officials clearly possess considerable discretion and broader responsibilities and formal authority than their street-level subordinates, see Economou, 438 U.S. at 505–06. They exercise discretion with respect to policy, programmatic, and managerial choices, a discretion they often seek to increase through strategic behavior. See CROZIER, *THE BUREAUCRATIC PHENOMENON* (1964); but see WILLIAMSON, note 51 *supra*, at 27–30. Such officials, however, usually exercise discretion of a different kind, in different contexts, on different sorts of occasions, capable of inflicting different types of harm, subject to a different repertoire of constraints and potential sanctions. For a revealing comparison of the very different kinds of discretion exercised by supervisory officials in two different street-level law enforcement agencies, the FBI and the drug enforcement agency, see WILSON, note 28 *supra*, at 58–59.

Street-level officials and their superiors also often differ markedly from one another in their social backgrounds, attitudes, and training. See BLAU, note 42 *supra*, at 213. Indeed, prison guards are similar in some respects to their prisoners, SYKES, note 67 *supra*, at 33; one might speculate that they have more in common with some of their charges than with some of their superiors.

In view of these many differences in tasks and in types of discretion (not to speak of other relevant differences) among officials within the same agency and among those in different agencies, performing similar street-level functions, it seems reasonably clear that no single immunity-liability rule applicable to all administrative officials is likely to optimize the mix of social objectives that such rules are designed to achieve. If a number of different official-specific rules were costless, the policy-relevant question would be: given the type and degree of discretion exercised by certain kinds of officials under certain conditions, how are particular rules likely to influence the way in which that discretion is exercised, and to what kinds of decisions are they likely to lead? Unfortunately, such elaboration and refinement of rule categories would almost certainly be costly in terms of increased uncertainty and consequent risk-minimizing behavior.

the outside world. Their performance and professional well-being depend upon congressional committees, the Executive Office of the President, courts, pressure groups, the civil service apparatus, the press, employee unions, and similar institutions possessing the powers to reward, punish, threaten, and embarrass. Coupled with the ambiguity and nonmeasurability of their official objectives, this dependency encourages officials to aspire less to the attainment of the agency's formal goals than to the avoidance of criticism. For example, it has been noted that the "state of affairs most costly to the police department [is] not a rising crime rate, but revelations of corruption, fiscal malfeasance, and citizen complaints of misconduct."⁸¹

The gap between resources and demand for (and entitlement to) service is endemic to street-level officials. In addition to the poverty of information that forms the basis for decisions, and the effect of heavy caseloads on the amount of time available for individual decisions, these restrictions also limit the recruitment, training, and hence the quality of such personnel. Moreover, these resource gaps seem chronic. The demand for street-level services appears to expand to meet any new supply, thus making it probable that any increment in resources will be used to increase the volume of services rather than to improve the accuracy of individual decisions.⁸²

The public official, to be sure, is not devoid of alternatives either. He can take the risk and hope that he is not sued. He can quit. He can urge the legislature to raise the civil service pay scale. Or he can attempt to minimize or eliminate the risk to himself. The next section explores the possibility that he will adopt the latter course, perhaps at considerable cost to society.

B. THE DECISIONAL CALCULUS OF THE PUBLIC OFFICIAL

The official's calculations themselves are certain to be influenced by the factors discussed in the preceding section, factors that create

⁸¹ WILSON, note 28 *supra*, at 198-99.

⁸² LIPSKY, note 46 *supra*, at 33-39. It should be noted that courts have increasingly refused to recognize budgetary constraints as relevant to either the definition of constitutional rights or the validity of the agency's or official's defense. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976); *Serrano v. Priest*, 96 Cal. Rptr. 601 (1971). See also Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Note, *Judicial Intervention and Organization Theory*, 89 YALE L.J. 513, 515 (1980).

Private firms and individuals, of course, also confront resource needs. They too must make decisions based on inadequate information whose quality could often be improved by addi-

pervasive uncertainties and risks in the official's working environment and are salient to his day-to-day decisional routines. But their influence is overshadowed by an even more consequential condition—the inability of public officials to appropriate to themselves the benefits that flow from their decisions.⁸³

The private actor, *e.g.*, a firm manufacturing a risky but profitable drug, often willingly encounters and incurs risks thought to be necessary for obtaining a desired benefit. In contrast, however, the official cannot, in any conventional sense, reap the benefits of his official actions; indeed, even to attempt to do so might well subject him to criminal sanctions.⁸⁴ His predecision calculus, then, is likely to be very different from that of the private firm or individual, where the latter will incur any cost if the expected value of the correlative benefit is great enough, the former will strive to hold the costs that he personally incurs to some minimum level. This minimum, which I call his "duty constraint," will vary from official to official, for it is defined by the official's particular attitudes toward, and trade-offs among, certain values and interests—some altruistic, some more narrowly self-interested—not easily accounted for by economic models.⁸⁵ Examples include feelings of professionalism, duty, or programmatic mission; fear of discipline or criticism for inaction, delay, or self-protective behavior; concern for professional reputation; habituation to routine; and convenience. The official will tend to orient his decisions about whether, when, and how to act not so much toward the maximization of net

tional expenditures. But depending upon their evaluation of the risks created by profits informed or highly constrained decisions, private decision makers can, without violating a legal duty, refuse to accept, or demand additional compensation for incurring, those risks.

⁸³ This fact is fundamental to predicting the behavioral response of officials to the risk of personal liability, and equally critical to evaluation of alternative regimes of official immunity/liability. It is remarkable that the Court has adverted to this fact only once, in a footnote. It suggested that in that particular case, there was no allegation that the officials-defendants had profited personally from the acts in question, concluding from this only that relief against the agency should satisfy plaintiffs. *Lake Country Estates, Inc.*, 1400 S. Ct. at 1179, n.29.

⁸⁴ Of course, that an official may derive personal satisfaction or even the possibility of future status and earnings from having performed decisively and well, but the returns to an official for accepting risk tend to be less tangible and less immediate than the putative rewards that motivate private actors to incur risks. For a discussion of this point, see Mashaw, note 65 *supra*, at 26–27.

⁸⁵ For a somewhat analogous concept, see the discussion of "atmosphere" in WILLIAMSON, note 51 *supra*, at 37–39.

benefits, which he cannot capture for himself, but toward the minimization (subject to the "duty constraint") of those costs that he must personally bear.

Among those costs is the possibility of being sued for damages.⁸⁶ The magnitude of this risk depends upon several factors: the expected cost of each of a variety of possible adverse outcomes, including a damage judgment; the expected pecuniary cost of having to defend an action, quite apart from its outcome; and any demoralization or other nonpecuniary cost associated with being sued for official misconduct. One element in this last category would be the cost of uncertainty itself—uncertainty concerning the outcome of the case, the stage of litigation at which that outcome would be reached, whether and to what extent the official would receive free counsel and indemnification (in the case of a settlement or adverse judgment), and similar contingencies.⁸⁷

No empirical question is more central to an evaluation of official immunity-liability rules than this: how do public officials actually perceive and evaluate the risk of incurring these costs? While no systematic evidence on this question exists,⁸⁸ there are reasons to believe that public officials are at least as risk-averse as decision makers generally. Decisions of street-level officials are likely to be especially problematical: erroneous, injurious to others, unprotected by recourse to rules or determinate objectives, constrained in important respects, vulnerable to public censure and sanctions. Officials have strong incentives to minimize costs—in particular, the risk of personal liability that their peculiar working milieu renders quite plausible—even if that cost-minimization strategy means foregoing social benefits. Finally, one may speculate that

⁸⁶ Other costs would include the risk of disciplinary sanctions, the risk of injury to reputation, exposure to physical danger or repellent conditions, inconvenience, and the like. Many of these risks are part of the ordinary working environment of many street-level officials.

⁸⁷ For example, officials apparently often experience considerable uncertainty and anxiety concerning the quality of the defense that free, agency-appointed counsel will provide them. Author's interview with Phil Michael, First Deputy Commissioner, N.Y.C. Department of Investigation, July 16, 1980.

⁸⁸ The academic literature addresses the empirical question of how decision makers perceive and evaluate low-probability risks, primarily in the context of financial markets and other profit-seeking activities. E.g., Kahneman & Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263 (1979); telephone interview with Howard Raiffa, Harvard Graduate School of Business, July 16, 1980. In the absence of measurable decision criteria (even one as controversial as profit maximization), evaluations of risk probably cannot be satisfactorily tested or verified.

people drawn to civil service careers tend to value security more and risk-taking less than citizens drawn to more competitive sectors.

If this analysis is correct another empirical question presents itself: how are such officials likely to respond to the risk of personal liability for damages presented by § 1983 and *Bivens*-type actions? This question is even less tractable to empirical elucidation than that of risk aversion. Few officials believe they have shirked their duty, much less acknowledge this publicly. Cognate motives are also at work.

Again, however, we are not without some basis for predicting patterns of official behavior. One set of suggestive theoretical considerations relates to the official's incentives, another to his opportunities. An official, I have argued, has an unusually strong incentive to minimize the costs to him of a particular course of action with little if any regard (once his duty constraint is satisfied) for the effect of that cost-minimizing strategy upon the social benefits likely to accrue from that action; indeed, in the extreme case, he would be willing to forego *all* such benefits so long as he could thereby reduce even slightly the costs to him of a given decision. Moreover, the official, like any rational decision maker, would have an incentive to shift as many decision-related costs as possible from himself to others. If (as appears likely) a public official is inclined to shift the costs to members of the public, he has ample scope to do so in ways that can escape detection or effective control. Studies of "street-level" bureaucracies have identified a variety of characteristic responses. They comprise the repertoire of defensive, self-protective techniques often associated (none too charitably) with "the bureaucratic mind." These techniques are most likely to operate in the "close" case and may assume any number of particular forms, but may generally be classified in four categories: inaction, delay, formalism, and a change in the character of the decisions.⁸⁰

⁸⁰ At the most general level of analysis, they are analogous to the "cost of avoiding accidents." CALABRESI, *THE COST OF ACCIDENTS* 26 (1970). Calabresi's analysis of the "general deterrence" and "specific deterrence" approaches to minimizing these costs, *id.* at chs. 5 and 6, lend strong support to the general line of argument advanced here. Calabresi argues that a "general deterrence" (*i.e.*, market-oriented) approach will reduce accident costs in two ways. First, by reflecting such costs in prices, people will tend to shift from more dangerous to safer activities, and will seek safer ways to conduct the same activity. *Id.* at 73-74. Officials, however, have both the incentive and capability to shift the costs associated with particular conduct to the public; hence the price of conduct to them cannot readily be

1. *Inaction.* If an official perceives that in order to perform an act within his line of duty he must run a risk of personal liability that exceeds his duty constraint, he may simply refrain from acting. Even the Supreme Court, not much given to behavioral analysis, has acknowledged the asymmetric pressures on officials confronted with the risk of personal liability:⁹⁰

While there is not likely to be anyone willing and legally able to seek damages from the officials if they do *not* authorize the administrative proceeding . . . , there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. "When millions may turn on regulatory decisions, there is a strong incentive to counter-attack."

Such asymmetry conduces to inaction so long as that is a viable alternative for the official. Any of several conditions would probably make inaction a viable alternative. First, the official may exercise sufficient discretion that his failure to act probably would not be likely to cause superiors or others to take notice. For example, it is unlikely that anyone will know when a patrolman fails to exercise initiative and follow up on suspicious behavior that he observes in a hostile neighborhood. Second, the official's behavior may simply not be visible to his superior or to those in a position to complain. An inspector who declines to enforce a clearly applicable statute against a violator is not likely to be sued by a consumer that he has failed to protect. After *Thiboutot*, an inspector who does enforce the statute may be subject to suit, a possibility reinforcing the temptations toward inaction. In such situations, the official's duty to act is not, practically speaking, enforceable. Third, regardless of visibility or discretion, the inaction may inure primarily to harm people who are likely to remain silent. The decision of a school principal to

made to reflect the costs. And he has an incentive to shift to a safer activity even if to do so would increase the sum of accident and accident-prevention costs. By the same token, Calabresi's analysis of "specific deterrence" (i.e., collective decision) suggests that as applied to official behavior, it will often operate perversely precisely because of officials' abundant incentives and opportunities to substitute for the prohibited act behaviors that yield even fewer social benefits and/or impose greater social costs, perhaps violating distributional and loss-spreading objectives as well.

⁹⁰ *Economou*, 438 U.S. at 515.

refrain from disciplining a disruptive student may injure the interests of the student's teacher and classmates, but they probably will be reluctant to challenge the principal's authority.⁹¹

2. *Delayed action.* The official, confronted with incentives favoring inaction, may nevertheless wish to act; he may seek to minimize the small but existent risk that he will be criticized or sanctioned for inaction, or he may feel that duty requires that he do something. But although delayed action, rather than total passivity, may serve his purposes rather nicely, it will often disserve the interests of the public.

Delayed action may take numerous forms: seeking predecision clearances from above; consulting with lawyers or requiring legal opinions before acting; and conducting additional, marginally ineffective investigation before acting are among the most plausible and frequently occurring ones. Delay forecloses opportunities for effective decision. It may amount to inaction threatening the same kinds of harm to public interests as inaction. Alternatively it may increase the costs of those actions that are ultimately taken.

3. *Formalism.* An official who feels impelled to act enjoys numerous opportunities to precede and surround his decision with formal procedures undertaken primarily in order to "build a record" with which he may subsequently defend his action, should that become necessary. Such a strategy, closely related to that of delay, may sometimes yield public benefits such as reduced error. Even where such procedures are likely to generate costs that outweigh any benefits, the official has strong incentives to employ them. Consider the practice of so-called defensive medicine, in which physicians order additional laboratory tests and other procedures with little regard to cost. Its attractiveness to the physician is not simply that the costs of these procedures will be borne by the

⁹¹ One analysis of the effect of *Wood v. Strickland*, 420 U.S. 308 (1975), on public education suggests that teachers "may be less likely to make controversial decisions, such as suspending rowdy students or affording special treatment to children with unusual talents or disabilities. With the current distaste for any form of differentiation, equality of treatment may appear to be the safest, if not necessarily the soundest, course. Alternatively, school people may delegate to parents and students decisions which they previously took upon themselves." Yudof, *Liability for Constitutional Torts and the Risk-averse Public School Official*, 49 SO. CAL. L. REV. 1322, 1397 (1976); see also WILSON, note 28 *supra*, at 181 (FBI Agents). Indeed, the temptation to "defensive decisionmaking" is stronger for officials than physicians. See FUCH, *WHO SHALL LIVE* (1974).

public; it is also that employing them reduces the risk of personal liability and the costs to him of the ultimate decision.⁹²

Manifestations of formalism are all too familiar: officials maintain elaborate records and require that those whom they regulate do so as well; flexible procedures are formalized and reduced to writing;⁹³ there is an emphasis upon processes rather than outcomes. Formalism leads ineluctably to legalism. As officials and their agencies learn to find comfort—and immunity from liability—in conforming to formal rules and procedures, one can expect that such rules and procedures will assure even more importance and prominence than the Court has accorded them in its “due process” jurisprudence. Increasingly, officials will regard the public not merely as clients or citizens but as potential adversaries and litigants. “Legalization,” as one commentator has put it in the context of the public schools, “may result in formally correct decisions which nonetheless ignore the real interests at stake. It may impose an inflexibility which makes adjustments to changing conditions more difficult. It certainly may impose substantial transaction costs.”⁹⁴ In any event, street-level officials have both the incentives and the opportunities to adopt formalism regardless of the costs or benefits to the public.

4. *Changes in the character of decisions.* Instead of refraining from or delaying action or contriving procedures, officials confronted with the risk of liability may simply substitute certain kinds of actions for those that they would have undertaken but for that risk. In particular, they may substitute relatively riskless acts for relatively risky ones. The more closely balanced the competing considerations, the more likely they are to make this substitution. Social workers may more readily—and prematurely—remove children from troubled families, rather than risk being sued on

⁹² Several commentators have drawn upon this analogy in somewhat different connections. See BARDACH & KAGAN, note 71 *supra*, at ch. 9; Yudof, note 91 *supra*, at 1395–97; see also Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 U. TORONTO L.J. 131 (1977).

⁹³ Ironically, the risk of liability may also induce officials to avoid committing certain matters to writing, with perverse consequences. See, e.g., Yudof, note 91 *supra*, at 1397–98.

⁹⁴ *Id.* at 1394–95. For the amusing musings of one opponent of legalizing the teacher-student relationship, see Stigler, *A Sketch in the History of Truth in Teaching*, 81 J. POLIT. ECON. 491 (1973).

behalf of an abused child.⁹⁵ Parole officers may refrain from recommending release in order to minimize the risk of suits by victims.⁹⁶ Supervisors may promote or give a good recommendation to a malingering or disruptive employee in order to get rid of him, rather than invite a suit for wrongful dismissal.⁹⁷

Moreover, a political and bureaucratic culture that is decidedly chary of visible risks to organized constituencies tends to penalize, often harshly, risky actions when they "fail" (as, by definition, they often must), yet fail to identify, much less reward, those same actions when they "succeed."⁹⁸ Consider, for instance, an official willing to accept some risk that potentially dangerous drugs will be approved as the prize for maximizing the probability that all therapeutically valuable drugs will be approved. If he approves a drug that turns out to be a thalidomide, he can expect to be hauled before congressional committees, disgraced professionally, and perhaps even fired. Yet when that same strategy leads to the approval of an important antibiotic, Congress will probably not notice and certainly will not congratulate the agency. The official's action simply blends into the "background noise" of administrative life.⁹⁹

⁹⁵ See *News Note*, 5 FAMILY L. RPTR. 2100 (state health department ordered to pay \$60,000 to father of child beaten to death, for inadequate investigation of reports of abuse by mother); 5 FAMILY L. RPTR. 2437 (social worker made co-defendant in \$7 million suit arising out of child abuse incident). To make things especially difficult, a social worker may also be sued for investigating a complaint too vigorously. See *Martin v. County of Weld*, 598 P.2d 532 (Colo. Ct. App. 1979). This double jeopardy will probably not produce more balanced behavior, but rather more extreme efforts to avoid any potential involvement, e.g., by leaving the job entirely.

⁹⁶ See, e.g., *Martinez*, 444 U.S. 277.

⁹⁷ The author's observations as a public official in the federal government suggest that this is a common strategy among supervisors in the civil service system.

⁹⁸ "Success," it has been said, "has many fathers but failure is an orphan." The risk aversion of political institutions is doubtless a complex phenomenon: the greater visibility and newsworthiness of failure in our society than of success and the related tendency to take success for granted, the tendency of our fragmented system to diffuse the "credit" for success, the general risk aversion of most individuals, social resistance to thinking of risk in relative terms and to considering opportunity costs imposed silent victims are some of the relevant factors. See Report of Committee on Risk and Decisionmaking, National Academy of Sciences (forthcoming); see also Wildavsky, *Richter Is Safer*, 60 THE PUBLIC INTEREST 23 (1980).

⁹⁹ Former FDA Commissioner Alexander Schmidt has noted that "In all [the agency's] history, we are unable to find one instance where a Congressional hearing investigated the failure of the FDA to approve a new drug . . . the message conveyed by this situation could not be clearer." Quirk, *Food and Drug Administration*, in WILSON, ED., *THE POLITICS OF REGULATION* 216 (1980); see Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973).

Occasionally political or legal incentives favoring vigorous decision making exist or can be generated. Moreover, one might create a countervailing cause of action for victims of bureaucratic passivity. To state this possibility, however, is to suggest the numerous and awesome difficulties that it would entail, such as identification of those to whom a duty to act extends, questions concerning causation, and evaluative problems generally. Furthermore, such a cause of action would place officials in a "damned-if-you-do, damned-if-you-don't" situation. It is not surprising that tort law as distinguished from mandamus has rarely been used in this fashion.

We are left, then, with officials who confront risks—of liability, of political criticism, of other adverse outcomes—that tend to converge in ways that encourage risk-minimizing behavior. The working environment of the street-level official, we have seen, is one that requires numerous decisions and actions of importance to others, often taken under conditions of pervasive ignorance, uncertainty, stress, and constraint. These decisions and actions carry with them a relatively high risk (relative, that is, to the decisions and actions of most of us) of being erroneous, illegal, and harmful to others. They are likely (again in relative terms) to be controversial and subject to intense public criticism, if not more severe sanctions.

When to these perils is added the risk of personal liability in damages for the consequences of those errors that (as every official knows) are an inescapable part of daily life on the job, the street-level official will be tempted to respond by seeking security wherever he can find it. Although most conventional avenues of protecting himself against that risk—especially appropriating benefits and demanding additional compensation—are as a practical matter foreclosed, he does possess one distinct advantage denied to most persons working at comparable levels in the private sector: because of unusually broad discretion, lack of close physical supervision or surveillance by superiors, and other factors, the official is to a considerable extent free to redefine his performance to suit his own needs. Minimizing risks to himself, including those of personal liability, is the most readily available strategy; the tactics of inaction, delayed action, formalism, and selection of the least risky decision alternative conduce to this objective.

How often are these self-protecting tactics actively employed and to what extent do they harm society? The answer, unfortunately, is that we cannot know. We cannot know because officials, like the

rest of us, like to think that they are performing their duty, and because behavior that minimizes risk to them often has *some* benefits for the public (such as reducing the probability of certain kinds of error). We cannot know because fear of personal liability is only one motive for risk-minimizing behavior and cannot easily be distinguished from others, such as fear of administrative sanctions, fear of public criticism, fear for personal safety, and sheer laziness, that can have similar behavioral effects.

Those who ultimately bear the costs of such behavior tend to be "silent victims," probably either unaware that they are being injured or ignorant that their victimization is the consequence of another's personal risk-minimizing behavior.¹⁰⁰ While, to some extent, all citizens and taxpayers are in this category, the silent victims I describe are individuals who must rely heavily upon street-level public services to assure their safety and well-being; they are almost certainly disproportionately poor and dependent. They are precisely the persons who can least afford to bear the costs of official self-protection, who are least likely to seek remedies, and whom a just society would least wish to burden.

Although we cannot know how much self-protective behavior by officials occurs, how much of that behavior is attributable to fear of liability, or how much of it is, on balance, socially harmful, there are reasons to believe that the magnitudes are both substantial and increasing. Because the victims of such behavior tend to be silent and because liability rules do not internalize all of its costs, such behavior is a "free good" to the official and, to some extent, to his agency as well. One may therefore predict with some confidence that they will engage in as much of it as their duty constraints permit. The Court's recent immunity-liability decisions have strengthened the already powerful incentives for such behavior. Whatever the risks of ultimate official liability may in fact be, it seems evident that the risks of being sued have increased markedly. The risk of personal liability, as subjectively perceived by officials, probably looms far larger than the objective probability of liability alone would suggest.¹⁰¹ Finally, because the costs of risk-

¹⁰⁰ See, e.g., REIFF, *THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY* (1980).

¹⁰¹ Interview with Harry Schnibbe, Executive Director, National Association of State Mental Health Directors, July 18, 1980 (officials will be disproportionately aware of the "horror stories" in which plaintiffs recover large judgments). See also Tversky & Kahneman,

minimizing behavior to the official tend to be slight or nonexistent, and he has no self-interested reason to advert to the social benefits foregone thereby, such behavior—even at a very high social opportunity cost—will appear rational to him. To adapt Professor Calabresi, the official will only rarely be the cheapest social cost avoider precisely because he will almost always be the cheapest personal risk avoider.

III

The possibility that the risk of personal liability for damages would perversely affect the balance of deterrence and vigorous decision making has not, of course, escaped the Court's notice.¹⁰² Moreover, the Court is surely aware of those developments—unprecedented growth in the number of civilian public officials (especially at the state and local levels),¹⁰³ expansion in the range and magnitude of their discretionary authority,¹⁰⁴ rising public dissatisfaction with official behavior,¹⁰⁵ and seven-figure damage judgments against tortfeasors¹⁰⁶—that have made the task of accommodating the competing objectives implicated by liability-immunity rules considerably more urgent and more complex.

Notwithstanding these complexities, the Court has resolved them with little refinement, usually in a few sentences. Occasionally, it has fully acknowledged the conflict and made the "inevitable

Judgment under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124 (1974); Combs & Slovic, *Causes of Death: Biased Newspaper Coverage and Biased Judgments*, 56 JOURNALISM Q. 837 (1979); *Ministerial Malpractice: Is It a Reasonable Fear*, 16 TRIAL 11 (1980).

¹⁰² Indeed, the consistency with which the Court acknowledges that concern is exceeded only by the consistency with which the Court overrides it in the name of compensation and deterrence. *E.g.*, *Owen*, 100 S. Ct. 1398; *Carlson*, 100 S. Ct. 1468; *Economou*, 438 U.S. 478; *Scheuer*, 416 U.S. 232.

¹⁰³ Civilian federal employment increased from 2.4 million in 1960 to 2.9 million in 1975; the number has been roughly constant since then. At state and local levels, government employment grew from 6.4 million in 1960 to 12.1 million in 1975, and 12.7 million in 1978. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1979 at xxii and xxiii (1979).

¹⁰⁴ See Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77 (1975).

¹⁰⁵ *E.g.*, see *Gallup Opinion Index*, June 1979 at 18-19; U.S. DEPARTMENT OF COMMERCE, SOCIAL INDICATORS 1976 at LXXVII (1977).

¹⁰⁶ See, *e.g.*, Americans for Effective Law Enforcement, *Survey of Police Misconduct Litigation, 1967-71* (published in HEARINGS ON THE FEDERAL TORT CLAIMS ACT BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS OF THE JUDICIARY, 95th Cong., 2d Sess. (June 15, 1978) at 62 (citing instances of judgment or settlements ranging from \$160,000 to \$3,000,000).

trade-off" on explicit grounds.¹⁰⁷ Sometimes, it has denied that any significant conflict between objectives exists.¹⁰⁸ Recently, it has simply ignored it, blithely pretending that expanding the remedy does not inevitably deepen the underlying tension.¹⁰⁹ Most commonly, however, the Court recognizes a conflict but quickly adds—usually in a single sentence and invariably without any supporting evidence or analysis whatsoever—that the availability of a qualified, "good faith" immunity fully and satisfactorily resolves it.¹¹⁰

A. THE CURRENT STATE OF LIABILITY AND IMMUNITY RULES APPLICABLE TO OFFICIAL MISCONDUCT

The flood of Supreme Court decisions during the last Term of Court concerning official and governmental immunity and liability has strewn some wreckage about, transforming the landscape in the process. In general, damage remedies and immunities are now available in cases challenging official illegality under the following circumstances:¹¹¹

1. A victim of illegal conduct by a federal official may maintain a direct, "*Bivens*-type" action against that official in his individual capacity for money damages, where that conduct violates certain provisions of the Constitution.¹¹²

2. A victim of illegal conduct by a federal official may maintain an action for damages against the United States under the Federal Tort Claims Act (FTCA), and any judgment obtained in such an

¹⁰⁷ See *Imbler v. Pachtman*, 424 U.S. 409, 424-29 (1976).

¹⁰⁸ The Court has found this tack particularly inviting when it has expanded governmental liability or restricted governmental immunity, the theory being that only the threat of personal liability will affect the official's behavior. *E.g.*, *Owen*, 100 S. Ct. at 1416-18 (municipal liability renders concerns about vigorous decision making "less compelling, if not wholly inapplicable"); *Monell*, 436 U.S. at 690-91.

¹⁰⁹ *E.g.*, *Thiboutot*, 100 S. Ct. 2502; *Carlson*, 100 S. Ct. 1468.

¹¹⁰ *E.g.*, *Carlson*, 100 S. Ct. at 1472; *Economou*, 438 U.S. at 506-08.

¹¹¹ For an excellent summary of the law as it stood prior to *Economou* and *Monell* see Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977).

¹¹² *Bivens*, 403 U.S. 338; *Economou*, 438 U.S. 478; *Passman*, 442 U.S. 228; *Carlson*, 100 S. Ct. 1468. Lower courts have extended this remedy to other unconstitutional conduct. See, *e.g.*, *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1974); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975); *State Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974). Jurisdiction in such cases rests upon 28 U.S.C. § 1331(a), at least where the amount-in-controversy requirement is satisfied.

action will bar an action against the individual official involved.¹¹³ This remedy is subject to several broad exceptions¹¹⁴ and a number of relatively narrow ones.¹¹⁵ If the illegal conduct supports both a *Bivens*-type remedy and an FTCA remedy (for example, an unconstitutional search by an FBI agent), plaintiff may pursue either (or both).¹¹⁶

3. A victim of conduct by a state official that is illegal under federal constitutional or statutory law may maintain an action for money damages under 42 U.S.C. § 1983 against the official in his individual capacity.¹¹⁷ However, such an action, if brought against state agencies or the State itself, would be barred by the Eleventh Amendment unless the relief requested can be characterized as "prospective"¹¹⁸ or merely "ancillary" to prospective relief,¹¹⁹ rather than as a "retroactive award" requiring payment of funds from the state treasury.¹²⁰

4. A victim of conduct by a municipal official who violates federal law may, however, maintain an action under § 1983 for damages against the appropriate municipal agency, so long as the injury is inflicted in the execution of official policy¹²¹ or through a governmentally legitimated "custom or usage."¹²² Such actions may also be maintained against municipal officials in their individual capacities without regard to those limitations.

¹¹³ 28 U.S.C. § 2676.

¹¹⁴ 28 U.S.C. § 2686(a) and (h). The breadth of these already expansive exceptions have been augmented by judicial construction.

¹¹⁵ See 28 U.S.C. § 2680(b)-(f).

¹¹⁶ *Carlson*, 100 U.S. at 1472-74. Again, a judgment under the FTCA would *pro tanto* bar the *Bivens*-type action.

¹¹⁷ Moreover, it is quite possible, though the Court has not yet reached the question, that this remedy would extend to conduct illegal under federal regulations as well. See *Chrysler Corp. v. Brown*, 99 S. Ct. 1705, 1714-17 (1979), where the Court constructed the phrase "authorized by law," which is similar to the phrase "and laws" in § 1983, to include regulations having the force of law. See also Schuck, *The Graying of Civil Rights Law: The Age Discrimination Act of 1975*, 89 YALE L.J. 27, 60-63 (1980). Presumably, the reach of § 1983 also extends to conduct illegal under federal common law. Jurisdiction in such cases must rest upon 28 U.S.C. § 1343(3), 1331(a), or some other provision.

¹¹⁸ *E.g.*, *Quern v. Jordan*, 99 S. Ct. 1139, 1143 (1979).

¹¹⁹ *Id.* at 1149, citing *Milliken v. Bradley*, 433 U.S. 267, 290 (1977).

¹²⁰ *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974).

¹²¹ *Monell*, 436 U.S. at 690. Since *Monell* on its facts "unquestionably involve[d] official policy," *id.* at 694 and 701, n.66, the Court's rejection of *respondeat superior* as a basis for liability under § 1983, *id.* at 691, is dictum.

¹²² *Id.* at 690-91, citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

These damage remedies, of course, are subject to whatever official or governmental immunities the defendant is entitled to invoke. The immunities are wholly creatures of federal common law. The questions in each case are whether and to what extent an immunity, well established at common law, was abrogated by Congress when it enacted § 1983, and whether an immunity that was not so established is nevertheless compatible with § 1983's purposes.¹²³ In a *Bivens*-type action against a federal official, the question is what kind of immunity, if any, the analogous state official would enjoy in an equivalent situation; in the absence of contrary congressional direction, the federal official is entitled to invoke the same immunity.¹²⁴

In general, the following immunity rules have emerged from the Court's recent decisions:

1. For acts taken pursuant to duties not requiring the exercise of discretion, no immunity is available to either an official or government entity charged with a violation of federal law.¹²⁵ A State or state agency enjoys absolute immunity against suits for retrospective money damages, not by reason of common law but under the Eleventh Amendment. A local or municipal government entity, however, enjoys no immunity for violations of federal law.

2. For acts taken pursuant to discretionary duties, officials may, depending upon the functions that they perform, invoke either an "absolute" immunity or a "qualified" or "good-faith" immunity. Absolute immunity, where applicable, extends to all acts performed "within the outer perimeter of [the official's] line of duty," however malicious the motivation;¹²⁶ accordingly, its availability *vel non* can readily be determined on a motion to dismiss. A qualified immunity, in contrast, extends only to acts performed in "good faith," a standard that contains both subjective and objective

¹²³ *E.g.*, *Owen*, 100 U.S. at 1409.

¹²⁴ *Economou*, 438 U.S. at 496-504. Whether this is the question that ought to be asked is doubtful. See *id.* at 524-26 (Rehnquist, J., concurring in part and dissenting in part).

¹²⁵ See *Casto*, *Innovations in the Defense of Official Immunity under Section 1983*, 47 TENNESSEE L. REV. 47, 102 (1979).

¹²⁶ *Barr v. Matteo*, 360 U.S. 564, 575 (1959). For those officials enjoying such immunity, this "outer perimeter" is to be viewed capaciously. *E.g.*, *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978). *Stump* also suggests that the act for which immunity is sought must be "judicial" (in the case of judicial immunity) as well as within the "outer perimeter," a somewhat different test. *Id.* at 360-63.

elements.¹²⁷ The availability *vel non* of this immunity ordinarily cannot be established on a pretrial motion, but only by evidence at trial.

3. The Court has extended absolute immunity from damage actions to acts of a judicial,¹²⁸ legislative,¹²⁹ and prosecutorial¹³⁰ nature; this is so even when the acts in question are performed by executive branch officials.¹³¹ Officials have been accorded an absolute immunity for administrative acts if they are tortious only under state law.¹³² With respect to acts that allegedly violate the Constitution, however, the Court has conferred upon executive officials only a qualified, "good-faith" immunity.¹³³

4. The immunity rules described above apply to federal, state, or local officials in § 1983 or *Bivens*-type actions.¹³⁴ Their applicability may vary, however, depending upon whether the relief sought is prospective or retrospective.¹³⁵

Viewed superficially, the Court has fashioned a clear and comprehensive scheme for resolving the immunity issues that arise in cases seeking to impose official or governmental liability. The bifurcation of immunity for discretionary acts into "absolute" and

¹²⁷ *Wood v. Strickland*, 420 U.S. 308, 321 (1975). The "outer perimeter" and type-of-act limitations apply to qualified immunity as well.

¹²⁸ *E.g.*, *Stump*, 435 U.S. 349; *Dennis v. Sparks*, 101 S. Ct. (1980).

¹²⁹ *E.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951); see also *Lake Country Estates*, 99 S. Ct. at 1180.

¹³⁰ *E.g.*, *Imbler*, 424 U.S. 409; *Yaselli v. Goff*, 275 U.S. 503 (1927).

¹³¹ *Economou*, 438 U.S. at 512-13, 515, 516-17. The Court has also conferred absolute immunity on judges when "exercising the State's entire legislative power" to regulate the bar, *Consumers Union*, 100 S. Ct. at 1978.

¹³² *Barr*, 360 U.S. 564; *Economou*, 438 U.S. at 494-95.

¹³³ *E.g.*, *Economou*, 430 U.S. 478; *Scheuer*, 416 U.S. 232. The Court did hold open the possibility of absolute immunity in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Economou*, 438 U.S. at 507. It seems reasonable to assume, however, that if the activities of a Governor of a State engaged in dealing with "mob rule" and those of the Secretary of Agriculture engaged in law enforcement activities do not qualify as "essential for the conduct of public business," this exception will remain a dead letter.

The Court has not yet addressed the scope of immunity for executive acts that allegedly violate a federal statute. The Court only recently recognized a remedy under § 1983 for statutory violations. See *Thiboutot*, 100 S. Ct. 2502.

¹³⁴ *Economou*, 438 U.S. at 500-03.

¹³⁵ The Court, for example, has denied immunity to judicial or prosecutorial acts in suits seeking only prospective relief against judges or prosecutors engaged in enforcement functions. *Consumer Union*, 100 S. Ct. at 1976-77. The Court also left open the possibility that it might deny immunity in such actions even for judicial acts.

"qualified," together with the assignment of one or the other of these levels of immunity to particular types of governmental acts, appears to impart precision and predictability to the process of adjusting the competing values implicated by immunity-liability rules. This appearance is deceiving.

B. THE QUALIFIED, "GOOD-FAITH" IMMUNITY

The Court's opinion in *Scheuer v. Rhodes* has constituted the point of departure for the important official immunity decisions of the last few years. Indeed, its far-reaching holding—that executive officials of a State, including the Governor, enjoy only a qualified immunity under § 1983—was thought by the Court to be so compelling and entrenched that in *Butz v. Economou*, the Court, with almost no additional analysis or elaboration, simply applied it to federal executive officials as well. It is all the more remarkable, then, that the Court in *Scheuer* nowhere even analyzed its major premise that a qualified immunity strikes an appropriate balance between the compensation, deterrence, and vigorous decision-making objectives.¹³⁶ An appraisal of that premise is long overdue.

An evaluation of the immunity rules developed by the Court in *Scheuer* and its progeny depends upon several elements: (1) whether the Court's particular allocation of absolute and qualified immunity to certain kinds of decisions in certain types of cases is sound; (2) whether the availability of the "good-faith" immunity can be determined at the threshold of the litigation; and (3) whether the substantive content of the "good-faith" standard is likely to be ascertainable, predictable, and equitable as actually applied to particular cases in the real world. I shall address each in turn.

1. *The allocation of absolute and qualified immunity.* To the official confronted with the risk of being sued, the difference between an absolute and qualified immunity is crucial. It is all the more troubling, then, that the Court's allocation of each type of immunity rests upon two sets of distinctions that bear only the most attenuated relationship to the avowed purposes of immunity rules.

¹³⁶ The Court merely quoted from *Pierson v. Ray*, 386 U.S. 547 (1967), to the effect that a policeman need not "choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in the damages if he does." 416 U.S. at 245. But in fact the nature of the "good faith" immunity means that the policeman does have to choose—between the risk of being charged with dereliction and both the risk of going to trial as to his "good faith" and the smaller risk of losing.

These distinctions are based upon the type of governmental function implicit in the act or decision in question and upon the source of the law that the official has allegedly violated.

The functional prong of the Court's allocation rule confers absolute immunity upon acts of a "judicial," "legislative," or "prosecutorial" nature performed in the course of official duty, whether they are performed by judges, legislators, prosecutors, executive officials, or others.

The scope of immunity available for conduct by executive officials that cannot be characterized as quasi-judicial, quasi-legislative, or quasi-prosecutorial, however, is far from clear, for the Court's treatment of this question has created significant uncertainties. The Court has never defined what constitutes an "executive act" or what characteristics of an act, if performed by an executive official, would justify different levels of immunity.¹³⁷ The Court in *Scheuer* seemed to hold that the scope of immunity enjoyed by executive officials, rather than being limited to a qualified immunity for constitutional torts, should vary depending upon the level of discretion and responsibility and "all the circumstances."¹³⁸ This unusually ambiguous formulation has never been clarified. The Court in *Economou* suggested that, at least as to federal executive officials accused of having committed constitutional torts, there might be "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business."¹³⁹ This, too, has never been elaborated. The Court has fashioned different rules for common-law and constitutional torts, yet the implications of this distinction are unclear. Finally, the Court seems to have held that those who engage in rule making pursuant to a legislative delegation of power may receive absolute immunity;¹⁴⁰ since rule

In *Economou*, the Court simply cited *Scheuer*. More recently, in *Carlson*, the Court devoted one sentence to asserting that vigorous decision making would not be inhibited because of the availability of the qualified immunity, citing only *Pasman*, which in fact had expressly declined to reach the immunity question. 100 U.S. at 1472.

¹³⁷ In some cases, the line separating judicial or prosecutorial from executive activity becomes fine indeed. See, e.g., *Safeguard Mutual Ins. Co. v. Miller*, 456 F. Supp. 682 (E.D. Pa. 1978); *Rheark v. Shaw*, 477 F. Supp. 897 (N.D. Tex. 1979).

¹³⁸ 416 U.S. at 247.

¹³⁹ 438 U.S. at 507.

¹⁴⁰ *Consumers Union*, 100 S. Ct. at 1975. The delegate in that case was a court, but it might as easily have been an agency or executive official. The Court mentioned only two factors unique to the Virginia case: the delegate court's claim to "inherent" rulemaking authority,

making is a common, indeed ubiquitous, form of executive decision making, this is a potentially far-reaching but uncertain development.

The first of these ambiguities—the failure of the Court even to clarify why certain executive activities justify an absolute immunity while others receive only a qualified immunity—is the most important. In none of the three major cases involving the immunity of executive officials (other than prosecutors) has the Court illuminated this central question. In *Pierson v. Ray*, involving local police officers (and a judge), the Court simply noted that at common law, judges had enjoyed an absolute immunity while policemen had received a qualified immunity; it did not attempt to explain or to justify the difference.¹⁴¹ In *Scheuer*, a case involving a governor, national guard officials, and a university president, the entire discussion of immunity strongly tends to justify an *absolute* immunity for high-level executive officials, rather than the qualified one that the Court ultimately conferred.¹⁴² And in *Economou*, which dealt with top Department of Agriculture officials, the Court essentially relied upon its earlier holdings in *Scheuer*, *Bradley v. Fisher*, and *Imbler v. Pachtman*.¹⁴³

It is necessary to look to the Court's justifications for judicial immunity to identify factors that the Court regards as requiring absolute immunity.¹⁴⁴ And when one does that, one is struck by

and its having exercised "the State's entire legislative power" as to the subject matter in question. *Id.* It is difficult to see why either factor should be relevant to the scope of immunity. *Cf. Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977).

¹⁴¹ 386 U.S. at 553–55. The Court noted that the police officers in that case had not claimed an absolute immunity. *Id.* at 555.

¹⁴² The Court pointed out that police officers enjoyed only a qualified immunity at common law, but it immediately emphasized that the question was "far more complex" where high officials are involved because their discretion "is virtually infinite." 416 U.S. at 245–46. It went on to quote with approval an earlier decision noting "the similarity in the controlling policy considerations in the case of high-echelon executive officers and judges" who enjoy absolute immunity. *Id.* at 246, n.8. And in reviewing what it regarded as the immunity-relevant considerations—e.g., the need for prompt action, the need to rely on factual information supplied by others, the situational ambiguity and complexity in which decisions must often be made—the Court implied that such officials require no less and usually greater protection than police officers. *Id.* at 245–47. Of course, it is possible that the Court had in mind a more flexible, multitiered system of immunity rules. No such system has been developed, however, and the uncertain costs of one would surely be great.

¹⁴³ 438 U.S. at 506–17, especially 511–12.

¹⁴⁴ The Court's treatment of prosecutorial immunity adds little to the analysis, for it focuses almost entirely on the effect of the fear of "harassment by unfounded litigation." 438 U.S. at 512.

the extent to which these factors justify no less an immunity for executive officials, especially at street level, than for judges and prosecutors. Thus, in *Bradley v. Fisher*, the Court emphasized five factors that in its view justified absolute immunity for judges: (1) the need for a judge to "be free to act upon his own convictions, without apprehension of personal consequences to himself"; (2) the controversiality and importance of the competing interests adjudicated by judges and the likelihood that the loser would feel aggrieved and wish to challenge the decision maker; (3) the self-protective record keeping to which judges would be driven in the absence of immunity; (4) the availability of alternative remedies, such as appeal and impeachment, for judicial wrongdoing; and (5) the ease of alleging bad faith, which would then require "the same vexatious litigation upon such allegations."¹⁴⁵

Yet bureaucrats, no less than judges, are expected and required to act objectively and without regard to personal considerations. There is no reason to believe that those who fail to persuade executive officials are any less aggrieved or less disposed to challenge an adverse decision than are those who lose in trial court adjudications, or that the interests at stake in one forum are importantly different from those in the other. The "record-building" response to fear of liability is not limited to judges; indeed, it is a particular temptation for most street-level officials. The array of alternative remedies for correcting executive misconduct is in fact far broader than those available against judges. And plaintiff's ease in alleging bad faith—and getting to trial on the issue—is at least as great with respect to executive officials.

When one contrasts the circumstances under which street-level decisions must often be made (momentarily; with broad discretion and little guidance; with little information; under great stress and uncertainty; in unfriendly surroundings; under severe resource constraints) with those under which judges render decisions (at their own speed; with discretion narrowed and guidance provided by precedent and the wording of statutes; with voluminous records and briefs; enjoying great deference; in friendly surroundings; able

¹⁴⁵ 13 Wall. at 347-54. See also *Stump*, 435 U.S. at 355, 364. Another possible argument not mentioned by the Court is the importance of finality in judicial decisions. But even if that interest were more significant in the case of judicial than in the case of executive decision-making, damage actions against judges could not affect the finality of any underlying decisions already rendered.

to treat time and information as "free goods"), it is difficult to resist the conclusion that suits against executive officials are more likely to be brought and to prevail than in the case of judges.¹⁴⁶ If the merest possibility that judges will be sued suffices to justify absolute immunity—and the courts seem to believe that it does—it remains to be demonstrated why a higher risk to street-level officials justifies any less.

In *Economou*, the Court sharply distinguished between the absolute immunity that it confers upon executive officials sued in federal court for acts that are merely tortious under state law and the qualified immunity they enjoy when they are sued for constitutional violations.¹⁴⁷ The Court did not even attempt to justify the distinction; instead, it simply cited *Scheuer*, which had not addressed it. The dissenting opinion in *Economou* demonstrated the artificial, arbitrary nature of the distinction.¹⁴⁸ If anything, the dissenters underestimated the ease with which plaintiffs can strip away the protection of absolute immunity simply by alleging constitutional claims. In the area of public employment litigation, for example, discharged or disciplined employees now commonly allege that their discharge or discipline was politically motivated, was in retaliation for criticism of the agency, or was without adequate procedures, in violation of the employee's First, Fifth, and Fourteenth Amendment rights. Evidently, such allegations ordinarily suffice to force the plaintiff's discharging official to go to trial.¹⁴⁹

¹⁴⁶ Ironically, the Court notes, as an argument in favor of absolute immunity for agency personnel involved in initiating or adjudicating administrative actions against private parties, that when "millions may turn on regulatory decisions, there is a strong incentive to counter-attack." *Economou*, 438 U.S. at 514-15. Yet this observation is at least as pertinent to executive immunity as to quasi-judicial immunity.

¹⁴⁷ 438 U.S. at 495, 497 n. 24, 507. By distinguishing *Barr*, 360 U.S. 564, on precisely this ground, the Court breathed new life into that much criticized decision.

¹⁴⁸ *Id.* at 522-24. Justice Rehnquist noted the ease with which many state law claims can be framed in constitutional terms: the essential uselessness of an immunity whose applicability must be litigated at trial; the equivalent chilling of vigorous decision making regardless of the legal source of the claim; and the falsity of assuming that constitutional torts are necessarily more injurious to the individual than common-law torts.

¹⁴⁹ See, e.g., *Burns v. Rovaldi*, 477 F. Supp. 270 (D. Conn. 1979); *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979); *Buckley v. City of Omaha*, 605 F.2d 1078 (8th Cir. 1979); *Fujiwara v. Clark*, 477 F. Supp. 822 (D. Haw. 1979); *Harper v. Blumenthal*, 478 F. Supp. 176 (D. D.C. 1979). In the context of an employment relationship in which improper political motivation is easy to allege and the interests of the public in an efficient governmental apparatus are significantly implicated, the weapon of a damage action against a

In evaluating the Court's approach to the allocation of immunity, it is easy to criticize the crudeness of the functional and source-of-law categories upon which the operative distinctions are based and the arbitrariness of the allocations that result. Two points may be made in extenuation. The Court has increasingly attempted to refine its functional categories, and the Court confronts a difficult choice in framing such rules. To minimize uncertainty, rules should be simple, predictable, and so easily applied that the immunity issue can be resolved at a very early stage in the litigation; they cannot turn on factual questions and distinctions whose resolution would require a trial or even extended discovery. On the other hand, greater certainty exacts a price. Rules that are simple tend to be simplistic; rules that are predictable tend to suppress complexity; rules that require no factual inquiry tend to overlook important contextual elements of reality.

2. *The stage at which the availability of the qualified immunity is determined.* In remanding *Scheuer* to the trial judge, the Court observed that the immunity issue could not be resolved on a motion to dismiss. Summary judgment or trial on the merits would be required.¹⁵⁰ In fact, subsequent cases have left no doubt that a full-dress trial will usually be needed to determine whether and to what extent a qualified immunity will actually be available to defendant.¹⁵¹ Thus, an official who knows that he enjoys a qualified immunity in fact knows very little. It is not merely the inevitable uncertainty owing to the necessity to apply a general standard to particular facts, unsettling and unpredictable as that might be; the

supervisor who enjoys only a qualified immunity is likely further to rigidify an already unresponsive system of public management. Other remedies for employer misconduct are not lacking. A somewhat novel approach was taken in the Civil Service Reform Act of 1978 (P.L. 95-454), which established a Special Counsel to investigate and prosecute, within the Civil Service disciplinary structure, allegations of supervisory abuses.

¹⁵⁰ 416 U.S. at 250.

¹⁵¹ *Scheuer* suggests that a trial will often be required to determine, not simply the applicability of the qualified immunity to defendant, but also to determine the scope of that qualified immunity as well: "... in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247.

For cases in which qualified immunity was granted only after trial see *Ohland v. City of Montpelier*, 467 F. Supp. 324 (D. Vt. 1979); *Knell v. Bensinger*, 522 F.2d 720 (7th Cir. 1975). The difficulty of obtaining a finding of good faith is illustrated by *Paton v. Laprade*, 471 F. Supp. 166 (D. N.J. 1979).

standard itself cannot be known until after trial, for it will depend, the Court has told us, upon "all the circumstances."¹⁵²

Several additional procedural aspects of the immunity defense remain. Many § 1983 and *Bivens*-type cases are tried to a jury,¹⁵³ and the "good-faith" issue is often submitted to it, thus augmenting the uncertainty inherent in the standard. Although the Court recently reserved the question,¹⁵⁴ it appears that the burden of persuasion with regard to the availability of qualified immunity in § 1983 and *Bivens*-type cases rests upon the official.¹⁵⁵ And while the location of the burden of proof will not always decide the outcome of the immunity issue,¹⁵⁶ it can be, and sometimes has been, determinative.¹⁵⁷ Discovery will often be required in order to resolve the question of "good faith" in both its subjective and objective aspects.¹⁵⁸

Perhaps most important, there is an inescapable and intimate relationship between the point of litigation at which the immunity issue is resolved and the consequences of the immunity standard itself. Qualified immunity undercuts vigorous decision making to the extent that its availability cannot be readily established. This remains true even if the immunity is ultimately conferred and the

¹⁵² It is not obvious what the Court had in mind in *Scheuer* in referring to a qualified immunity of "varying scope." Perhaps the Court meant that in addition to absolute and qualified immunity, there could be lesser or intermediate levels of immunity as well, depending upon "all the circumstances." While the Court's formulation seems to suggest this possibility, I am aware of no court having taken that approach, at least explicitly. Perhaps the Court only meant that the applicability of the immunity, i.e., the determination of whether the official acted in "good faith," would depend upon "all the circumstances." If so, the Court's reference to "varying scope" was not particularly felicitous.

¹⁵³ Although it seems obvious that only a judge can resolve the question whether the law was sufficiently settled for the defendant to have been reasonably apprised of it, the practice is not so clear. See *O'Connor v. Donaldson*, note 26 *supra*, at 577 (on remand, jury to consider both objective and subjective components of defendant's good faith). See also *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Negron v. Ward*, 458 F. Supp. 748 (S.D.N.Y. 1978); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977).

¹⁵⁴ 100 S. Ct. 1920, 1924 (1980).

¹⁵⁵ *E.g.*, *Tyrrell v. Speaker*, 535 F.2d 823, 828 (3d Cir. 1976); *United States v. Sielaff*, 564 F.2d 153, 155 n.2 (3d Cir. 1977); *McCray v. Burrell*, 516 F.2d 357, 370 (4th Cir. 1975); *Dellums v. Powell*, 566 F.2d 167, 176 (D.C. Cir. 1977). But see, *e.g.*, *Cruz v. Beto*, 603 F.2d 1178 (5th Cir. 1979); *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977). The factors mentioned by the Court in *Gomez* that lead to imposing the burden of pleading upon defendant (especially plaintiff's relative ignorance of the pertinent facts) are relevant to the location of the burden of persuasion as well and may suggest that the Court will ultimately resolve the latter question in the same way. 100 S. Ct. at 1924.

¹⁵⁶ *E.g.*, *Cruz*, 603 F.2d 1178; *Sielaff*, 564 F.2d 153.

¹⁵⁷ *E.g.*, *Eckerd v. Indian River School District*, 475 F. Supp. 1350, 1368 (D. Del. 1979).

¹⁵⁸ See, *e.g.*, *Fujitawa*, 477 F. Supp. at 837.

official prevails. If a trial is necessary to establish that the official should not have to stand trial, then the purpose of the immunity—to harmonize the compensation, deterrence, and vigorous decision-making objectives—will have been frustrated, the Court's assurances to the contrary notwithstanding.¹⁵⁹

3. *The application of the "good-faith" standard.* The evolution of the substantive content of the "good-faith" standard for qualified immunity has been described elsewhere.¹⁶⁰ Suffice it here to stress several aspects of the standard, as formulated and elaborated by the courts, that threaten vigorous decision making. First, as the Court implied in *Scheuer*¹⁶¹ and made explicit in *Wood v. Strickland*,¹⁶² the standard consists of both an objective and a subjective test of "good faith." An official who fails either test receives no immunity. In practice, subjective bad faith or improper motivation is infrequently found.¹⁶³ The availability of the immunity ordinarily turns upon an assessment of the objective circumstances in which the disputed action was taken, particularly whether defendant knew or reasonably should have known that the action violated "settled, indisputable law," "basic, unquestioned constitutional rights," or "clearly established constitutional rights" (depending upon which of the formulations in *Wood* one prefers).¹⁶⁴ Like the Court's protestations in *Economou* that the availability of qualified immunity could readily be resolved without the necessity for trial, its assurances in *Wood* that the qualified immunity standard would not cause good-faith decisions to be second-guessed by federal judges and juries¹⁶⁵ has proved to be less than prescient.¹⁶⁶

¹⁵⁹ *Economou*, 436 U.S. at 50-51. Here, as elsewhere in its descent down the slippery slope, the Court was warned. *Id.* at 527 (Rehnquist, J., concurring in part and dissenting in part).

¹⁶⁰ E.g., Casto, note 125 *supra*, at 85-102; *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1211-17 (1977); Newman, note 2 *supra*, at 459-62.

¹⁶¹ 416 U.S. at 247-48.

¹⁶² 420 U.S. at 321.

¹⁶³ But see *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979), in which defendant, defeated by plaintiff in a contested election, ordered plaintiff's arrest in retaliation. Punitive damages were upheld. See also *Dellums*, 566 F.2d 167; *Redmond v. Baxley*, 475 F. Supp. 1111 (E.D. Mich. 1979); *Negron*, 458 F. Supp. 748.

¹⁶⁴ 420 U.S. at 321, 322. See also *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). In *O'Connor*, 422 U.S. at 577, the Court seemed to add yet a fourth test: foreseeable constitutional developments.

¹⁶⁵ 420 U.S. at 321-22, 326.

¹⁶⁶ Nor is this criticism simply a case of clairvoyant hindsight. Four dissenting Justices predicated some of the difficulties that lay ahead, especially that of denying immunity for

The "good-faith" standard had to mean more than an absence of actual malice. If the "objective" element of the standard meant anything at all, it required some reference to the legality of the disputed action. If not, how could § 1983 or the Constitution deter officials at all? The problem, of course, is that the law—especially constitutional law under the vague contours of the Due Process Clause—is at best uncertain. Whether or not this ambiguity is a virtue, as many affirm,¹⁶⁷ it is a reality that the Court—and decision makers under a duty to act—cannot alter. In *Wood* itself, the school board expelled several girls for violating a school regulation prohibiting the possession or use of any "intoxicating beverage" at a school-sponsored activity, the plaintiffs having spiked sixty ounces of soft drinks with twenty-four ounces of malt liquor. The school board, the district court, the court of appeals, and the Supreme Court (not to mention the girls) each managed to interpret this regulation differently.¹⁶⁸ The Supreme Court required no fewer than three pages of analysis and nine footnotes to reach an inconclusive result on the issue. Given the nature of the disagreement and the plausibility of differing views,¹⁶⁹ a lawyer's opinion on the question, had it been sought, would probably have been equally inconclusive. And lest the point be obscured, the dispute in this case revolved around the meaning of a regulation concerning school parties—a far cry from the central meaning of the Due Process Clause.

A recent decision, while perhaps an extreme example, suggests how elusive "good faith" may become in the hands of a judge or jury.¹⁷⁰ A teacher was discharged for criticizing the school administration (so the court found) in violation of his First Amendment rights. The defendant school board members had consulted an attorney who, when asked if such a discharge "would stand up in Federal court," offered a response that, while not a model of lucid-

what would appear to be good faith ignorance of the law. *Id.* at 327-31 (Powell, J., concurring in part and dissenting in part).

¹⁶⁷ See, e.g., Fiss, Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 11 (1979).

¹⁶⁸ 420 U.S. at 322-26.

¹⁶⁹ The interpretations differed on such questions as whether "intoxicating beverage" was linked to the definition of a closely related term in a state statute, whether it was intended to cover beer, and the nature of the incident that led to its adoption five years earlier. *Id.* at 324-25.

¹⁷⁰ *Eckerd*, 475 F. Supp. at 1369-70.

ity, concluded that liability was quite unlikely. When the board, relying upon this advice of counsel, proceeded to discharge the teacher, the court refused to find objective good faith (it placed the burden of proof on defendants) and imposed liability.¹⁷¹ How much law—and what qualifies as “law” is a core issue—should a police officer, or prison guard, or schoolteacher, or hospital administrator be expected to know? When is the official’s failure to consult a lawyer reasonable? Would a lawyer’s advice have given sufficiently clear direction to the lay official? What if the official’s superiors provided him with guidelines but the guidelines failed to address the issue? What if following a rule, more or less “settled,” would have sacrificed other compelling interests to which the official’s duty extended?

These (and other) questions that ought to preoccupy the trier of “good faith” under the *Wood* standard cannot be formulated with precision. Moreover, the “good-faith” standard is most definitely not the equivalent of a simple negligence standard for public officials. It calls for a judgment about reasonableness, to be sure, but in a context in which the Court has acknowledged that the official’s unique range of discretion and responsibility to act are centrally relevant. Even if the standard were that of conventional negligence, however, the task of applying it to the official’s beliefs concerning what was required at the time of the conduct in question would be highly problematical, if only because a juror’s own experience is unlikely to provide much guidance. Administering a troubled inner city school is not the same as caring for a neighbor’s children.

¹⁷¹ Specifically, the attorney told the board that the legality of the firing “would depend upon a lot of factors that I could not and would not assume responsibility for” and that “I didn’t think it should be a major consideration in their deliberations.” Reliance on counsel was held to be inadequate to show good faith because the defendants had not specifically inquired about constitutional rights, and because, in any case individuals “ought not [to be able to] avoid the responsibilities of public office by the simple act of consulting a lawyer.” *Id.* at 1369–70.

The problem, it seems, is getting worse. The Court’s recent decisions in *Rhode Island v. Innis*, 100 S. Ct. 1682 (1980), broadly defining the kinds of interactions between the police and suspects that constitute “interrogations” triggering constitutional safeguards, and *United States v. Henry*, 100 S. Ct. 2183 (1980), broadly defining the situations in which information reported to the police by inmates who converse with incarcerated suspects violates the latter’s constitutional right to counsel, are additional examples. These decisions were so unpredictable and have already sown so much confusion that even constitutional experts, no less police officers on the street and those who must train them, apparently do not know what to make of them. See Greenhouse, *On Balance Defendants Still Gain New Rights*, N.Y. TIMES, June 22, 1980, p. 8E; Barbash, *Police Confusion: Supreme Court Decisions Grow Harder to Interpret*, WASH. POST, July 21, 1980, p. A1.

Finally, most cases applying the qualified immunity standard will involve important conflicting values. They probably are resolved less on the basis of a nice weighing of analytically relevant factors than on the basis of inchoate, "gut" feelings about the case—for example, the moral character of the respective parties, the plight of plaintiff if compensation is denied, the likelihood that a judgment against defendant will ultimately be borne by a "deep pocket," and the like. One can speculate whether such a decisional process will systematically favor plaintiffs-victims or defendants-officials. The important point, however, is that the qualified "good-faith" immunity standard, far from assuring an official that vigorous decision making will be rewarded, is pregnant with risk to him: a rather small risk that he will ultimately be held liable, a somewhat higher risk that the immunity will ultimately be denied, and a substantial risk that a full-dress trial will be necessary to establish its applicability and scope. And even if immunity is ultimately conferred, he may be liable for plaintiff's attorney's fees. It is within the shadow cast by those risks that the official will decide what his duty—to himself as well as to the public—requires of him.

B. OFFICIALS' ABILITY TO SHIFT THE RISK OF LIABILITY TO OTHERS

Thus, the behavior of the street-level official is likely to be influenced by his perception of the risk of being sued, a risk magnified by recent Supreme Court decisions such as *Scheuer*, *Economou*, *Carlson*, and *Thiboutot*.

If this analysis is correct, then yet another empirical question immediately assumes crucial importance: to what extent are the officials' risks of being sued and of incurring personal liability vitiated by the fact that these risks will be shifted elsewhere?¹⁷² It is little short of astonishing that, despite the obvious centrality of this question, no Supreme Court majority has ever so much as mentioned it.¹⁷³ If the Court's silence signifies a belief that risk shifting

¹⁷² In the private sector, persons exposed to comparable risks of liability would almost certainly obtain protection by contract, see Epstein, note 54 *supra*, at 63, or by demanding additional compensation.

¹⁷³ This virtual silence from the Court is all the more remarkable because the issue has received some detailed empirical investigation from commentators. *E.g.*, Jaffe, *Suits against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 216-17 (1963); Bermann, note 111 *supra*, at 1190-1202; Yudof, note 91 *supra*, at 1383-90; Newman, note 2 *supra*, at 456-57; Casto, note 125 *supra*, at 118-19; Project, *Suing the Police in Federal Court*, 88 YALE L.J. 447, 810-11 (1978).

rarely occurs, it is ill-informed and naive. If, on the other hand, it implies a belief that risk shifting routinely and predictably occurs, that belief seems equally misplaced, especially with respect to federal employees. As best one can tell, the truth lies somewhere in between: the ability of officials to shift the risk to the public employer is often far from assured. Perhaps most important, this uncertainty is probably greatest in precisely those situations in which the social consequences of such uncertainty are likely to be most perverse.

The potential for shifting the risk of personal liability to the government derives from three institutional arrangements affecting the relationship between an official and his governmental employer: (a) governmental provision of free defense counsel; (b) governmental purchase of liability insurance for the official-employee; and (c) governmental indemnification of the official-employee. In each case, an expense that would otherwise fall on the individual defendant is assumed by the government (or, in the case of insurance, assumed by the government with further risk sharing by a third party). Whether a defendant in a specific case will be protected by any or all of these devices will depend upon a number of factors, especially the language of the statutory or contractual provision applicable in his case.

When a federal employee is sued for actions taken in the scope of his employment, the government will ordinarily defend him at public expense.¹⁷⁴ In certain categories of situations in which the interests of the government and the official will diverge, the government will retain private counsel for the official at public expense.¹⁷⁵ The government will neither represent nor retain counsel for an official-defendant in three types of cases: where the official is a target of a federal criminal investigation or proceeding; where the acts sued upon "do not reasonably appear to have been performed within the scope of his [federal] employment"; and where the government determines that representation "is not in the interests of the United States."¹⁷⁶ There are no written guidelines elaborating on these ambiguous standards.

¹⁷⁴ See 28 C.F.R. §§ 50.15-16 (1979).

¹⁷⁵ 28 C.F.R. §§ 50.15(a) (5)-(6). Oddly enough, the regulations for appointment of private counsel do not specifically address the situation in which a potential conflict of interest exists not between multiple dependents but between the official defendant(s) and the government. See, e.g., *Aetna Cas. & Surety Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978).

¹⁷⁶ 28 C.F.R. § 50.15(b).

For state and local officials sued under § 1983, the availability of a publicly subsidized defense depends upon the provisions of local law. A majority of States now apparently provide for the defense of state and local employees sued for actions taken within the scope of their employment.¹⁷⁷ Even an assurance of representation by government counsel, however, rather than allaying officials' fear of being sued, may in fact exacerbate it if they lack confidence in the quality of the counsel assigned to the case or if the counsel may be subject to conflicts of interest.¹⁷⁸

Federal law does not provide for the purchase of insurance against the personal liability of officials, except for certain medical personnel. Some state laws do provide for the purchase of such insurance, but the authority and coverage vary from State to State and policy to policy and no overview analysis has been conducted. This practice must be distinguished, of course, from the more common one of a state or local government entity purchasing insurance against its *own* liability or indemnity costs. The extent of self-insurance by officials is uncertain but it appears to be quite limited. And although the question of the insurability of public officials against such liability has not been much litigated, insurance against certain kinds of risks could be held to be contrary to public policy.¹⁷⁹

To shift the burden of liability to the government, officials must be fully indemnified for any adverse judgments. Such indemnifica-

¹⁷⁷ Much of the information on state defense and indemnity statutes discussed here was derived from a survey of the states conducted by Professor Richard G. Miller, University of Hawaii at Manoa, for the Hawaii Attorney General and generously provided to me. Because some States did not respond to the survey and some provided only brief responses, a precise count of States in which certain provisions discussed below apply is not available. Responses did provide sufficient information, however, to make generalizations possible about the more common forms of employee protection devices.

¹⁷⁸ Interview with Phil Michael, note 87 *supra*. Subtle (and not-so-subtle) conflicts of interest may become apparent only after the case is well under way.

¹⁷⁹ The question is whether insurance against liability under § 1983 or *Bivens* is against public policy because it reduces the deterrent value of the penalty. Insurability of a private defendant for liability under Title VII was upheld in *Union Camp Corp. v. Continental Casualty Corp.*, 452 F. Supp. 565 (S.D. Ga. 1978), but only because no discriminatory intent had been found. The court there suggested that intentional violations should not be insurable. Under § 1983, individual liability would necessarily entail a finding of intent to harm or unreasonable failure to know relevant constitutional law. In the corporate sector, the SEC has opposed indemnification of corporate directors and officials who violate the Securities Act of 1933 but curiously does not object to purchase of insurance on their behalf by the employer. With regard to other statutes whose purpose is chiefly compensatory, the SEC opposes neither insurance nor indemnification. BISHOP, INDEMNIFYING AND INSURING THE CORPORATE EXECUTIVE (1981).

tion is neither certain nor universal. No general statutory provision exists for indemnification of federal employees for liability imposed on *Bivens*-type or other claims, even where the liability clearly arose within the scope of their employment.¹⁸⁰ Nevertheless, a large class of federal tortfeasors are indemnified in fact if not in law. Claims against federal officials that constitute torts under state law may be brought against the United States under the Federal Torts Claims Act, and the availability of this "deep pocket" presumably diverts many of these claims away from the official tortfeasor.¹⁸¹ In a minority of these cases, the government's liability is exclusive and officials are absolutely immune from suit.¹⁸² Where both the official and the United States are named defendants and there is liability under the Act, the government will satisfy any judgment in its entirety, thereby barring any other or further litigation against the official.¹⁸³

The FTCA, however, is less a solid shield against official liability than a barrier of open-mesh wire. The category of tortious acts to which it applies is limited, and it is riddled with broad exceptions. Accordingly, many substantial claims against federal officials are not covered by the FTCA; in such cases, federal officials remain vulnerable to personal liability.

¹⁸⁰ Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 296 (1980); Bermann, note 111 *supra*, at 1191. There appear to be only two exceptions in which indemnification is specifically authorized by statute: for actions based on "anything done" in enforcement of the Internal Revenue Code (26 U.S.C. § 7423) and for malpractice suits against medical personnel of several named agencies (see 10 U.S.C. § 1089(f), 22 U.S.C. § 817(f), 38 U.S.C. § 4116(e), and 42 U.S.C. §§ 233(f) and 2458a(b)). The latter provisions apply only to actions based on incidents outside the United States. In domestic malpractice suits, the remedy against the United States under the FTCA is exclusive.

¹⁸¹ 28 U.S.C. § 1346(b), 28 U.S.C. §§ 2671-80. Other statutes authorizing suits against the United States are 5 U.S.C. § 552a(g) (for willful failure of an agency to respond to request for correction of information on file), 26 U.S.C. § 6110(i) (for failure of the department of the Treasury to release tax records to the public as provided by law, or to protect confidentiality of tax files when released), and 18 U.S.C. § 2520 (against any person who illegally intercept private communications).

¹⁸² The United States is the exclusive defendant in cases brought for negligent operation of a vehicle (28 U.S.C. § 2679(b)); patent infringement (28 U.S.C. § 1498); improper levying on property to collect taxes, where the suit is brought by someone other than the taxpayer levied upon (26 U.S.C. § 7426(d)); medical malpractice by Veterans' Administration staff (38 U.S.C. § 4116); and unlawful seizure of seagoing vessels (46 U.S.C. § 745).

¹⁸³ 28 U.S.C. § 2676. Interview with Justice Department officials James Steinberg, Michael Dolan, Jack Farley, and John Euler, July 17, 1980. Bermann, note 111 *supra*, at 1192. The United States is barred from seeking contribution from the official. *United States v. Gilman*, 347 U.S. 507 (1954). See Jayson, *HANDLING TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* 3-55, § 88 (1964 & 1980 Supp.).

The extent of indemnification under state and local law—a matter of considerable significance in cases brought under § 1983 (or under state law)—varies considerably from jurisdiction to jurisdiction; in general, these laws are, if anything, less protective of the official than the FTCA. Most States now provide for some form of indemnification or other protection against adverse judgments,¹⁸⁴ but some apparently provide it only in narrowly limited situations.¹⁸⁵

Provisions are far from uniform with respect to local autonomy, coverage, and other variables. Some state laws provide for mandatory (or permissive) indemnification by any governmental entity.¹⁸⁶ Others cover only state employees and leave protection of municipal employees to local discretion.¹⁸⁷ To complicate matters further,

¹⁸⁴ This analysis applies in general to settlements as well as judgments. Like judgments, settlements are indemnifiable or otherwise protected against in most States. By the same token, for federal employees, settlements like judgments are not indemnifiable, although the government will pay any settlement where it is named as a co-defendant. In those states which immunize the official and impose liability directly on the employer, the employer naturally bears the cost of any settlement. Of those which retain the official defendant, but provide indemnification, some provide explicitly for payment of settlements. See, e.g., Cal. Govt. Code § 825. Others use a general term which appears to include settlement. See, e.g., N.Y. Pub. Off. Law § 17. Some States allow reimbursement of a settlement only if it has received prior approval from a government legal officer. Cal. Govt. Code § 825. Thus there is some possibility that payment might not be made where the official is for some reason more anxious to settle than the agency. Conversely, the agency may settle more readily than the official. Provisions protecting the official in such instances may be required in some cases. See N.C. Gen. Stats. § 143-300.6, requiring employee's approval of settlement if it exceeds State's statutory ceiling on liability. Another possible loophole arises in States that provide insurance rather than, or in addition to, indemnification. Such laws typically allow insurance against "tort liability." Nev. Rev. Stats. § 41.038, S.C. Gen. Stats. 1-11-140, which may or may not include settlement costs. See Yudof, note 91 *supra*, at 1387-88.

¹⁸⁵ For example, the only activity for which employees appear to be explicitly protected in Alabama is civil defense. Ala. Code § 31-9-(6). In Kentucky there is a general provision for defense of state employees but apparently not for their indemnification, except that they are immune from claims for pain and suffering. Ky. Rev. Stat. §§ 12.211, 44.070. The only action for which South Carolina state employees appear to be held harmless by statute are those relating to removal or disposal of feral dogs, Code of Laws of S.C. § 47-3-320, although the State has general authority to purchase insurance against its own liability and that of its employees, *id.* at § 1-11-140. New Hampshire has a general provision for indemnification of local employees, N.H. Rev. Stat. Ann. 31:104-07, but does not appear to have such a provision for state employees.

¹⁸⁶ For example, Cal. Govt. Code § 825 provides for defense and indemnification for employees of any "public entity." See also Kansas Stat. Annot. § 75-6109. More commonly, state and local employees are treated separately and coverage may or may not be equal in scope. See, e.g., N.Y. Pub. Off. Law § 17 (state employees) and N.Y. Gen. Munic. Law §§ 50-a to 50-k (municipal employees).

¹⁸⁷ Louisiana provides for defense and indemnification of state employees, La. Rev. Stat. § 13:5108.1, but appears to have no similar provision for local employees. Missouri provides a tort defense fund for certain identified categories of state employees only, Vernon's Annot.

in localities where such protection is not provided by law, it may nevertheless be obtained contractually by public employee unions through collective bargaining.¹⁸⁸ A majority of States now provide for mandatory indemnification and defense of most state and local employees, either by shifting liability for acts of its employees exclusively to the entity,¹⁸⁹ or by retaining the employee as the nominal defendant and requiring the entity to pay his costs.¹⁹⁰ In some cases, blanket statutes cover all employees;¹⁹¹ in others, various categories of officials are addressed by individual statutes. Most laws contain some form of "bad-faith" exclusion, precluding government liability in such cases. In addition, some specifically condition indemnification on good-faith cooperation by the employee in the defense.¹⁹²

Not all statutes conform to the general format described above, even within that format there are many variations. Specific categories of employees and specific types of liability are often excluded. In particular, many state statutes do not specifically address federal liability under civil rights laws, but rather are geared to state tort claims (often limited to negligent torts).¹⁹³ This omission may be critical if courts choose not to interpret the statute to encompass federal claims.¹⁹⁴ Some States provide dollar limits on

Mo. Stat. § 105-710; provisions for local employees appear to be highly selective. See *id.* at § 537.165 (duty to defend, but not indemnify, tort actions against firemen violating use of motor vehicles). Other States provide for defense and indemnification but only at local option. See, e.g., N.C. Gen. Stats. §§ 160A-167.

¹⁸⁸ Telephone conversations with Janet Kail, research department, American Federation of State, County and Municipal Employees, July 15, 1980. Cal. Govt. Code § 825 provides that statutory defense and indemnification provisions may be supplemented by contract provisions for employees of the higher education system.

¹⁸⁹ See, e.g., Conn. Gen. Stats. Annot. § 4-165.

¹⁹⁰ See, e.g., Cal. Govt. Code § 824.

¹⁹¹ Compare Cal. Govt. Code § 825 (applying to any "employee or former employee of a public entity") with N.Y. Gen. Mun. Law §§ 50-a to 50-k and 52 (treating separately claims against police, corrections officers, physicians, etc., and claims based on negligent operation of a vehicle, and permitting but not requiring purchase of insurance for employees generally).

¹⁹² See, e.g., Ariz. Rev. Stats. § 41-621.

¹⁹³ Conn. Gen. Stats. Annot. § 7-465; Del. Code Annot. § 4001; Ind. Code Annot., ch. 16.7; Iowa Code Annot., ch. 25A.21; La. Rev. Stats. Annot. § 13:5108.1; N.M. Stats. Ann. § 41-4-4-C; N.H. Rev. Stat. Ann. 31:106; and Vernon's Tex. Civ. Stat. Annot. 6252-26(1) (a) (2).

¹⁹⁴ For example, in 1976 the New York legislature had to amend retroactively its indemnification statute for New York City employees after it learned that § 1983 claims were not covered; New York L. 1976, c. 832. (This provision was later repealed and replaced with a more comprehensive law covering all New York City employees, New York L. 1979, c. 673

the amount of the indemnity, leaving the employee to satisfy excess claims.¹⁹⁵ Conversely, some States set dollar limits on the size of claims, although these could not limit claims under federal law.¹⁹⁶ Many States have their own tort claims laws, sometimes modeled on the FTCA;¹⁹⁷ these statutes often have the same exclusions as the federal act.

State laws also vary in the procedures through which protection is provided. In some, the entity becomes exclusively liable for the torts of its employees, and the government acts as the defendant throughout. Others require the employee to request defense and indemnification at the outset of the litigation. Some states provide for a threshold determination by a legal officer as to whether the action sued upon is one for which protection may be provided. If the determination is negative, the employee must carry on his own defense, subject to subsequent reimbursement if the ultimate judicial finding indicates that a public defense would have been appropriate.¹⁹⁸ Other States reverse the burden in such cases, allowing the entity to recover defense and judgment costs after the fact from the employee, if it is ultimately determined by the court that the

(codified as N.Y. Gen. Mun. Law § 50-k.) The omission was discovered when two city policemen were held liable under § 1983 for a total of \$102,400, for severely beating a man taken into custody for a minor crime. Because the previous law referred only to negligent acts, the City refused to indemnify. See articles in N.Y. TIMES, Nov. 18, 1975, p. 72; Dec. 21, 1975, p. 25; July 29, 1976, p. 37. In seeking corrective legislation, the Patrolmen's Benevolent Association said the officers would "be in hock for the rest of their lives" if the law were not amended. *Id.* Dec. 21, 1975, p. 25. Even the current law precludes indemnification where a disciplinary action was taken in connection with the action sued upon. N.Y. Gen. Mun. Law § 8-50-k(5). Such a statute not only clouds the prospect of indemnification, but also discourages administrative efforts to correct errant behavior.

¹⁹⁵ South Dakota permits but does not require indemnity up to \$10,000, S.D. Comp. Laws Annot. ch. 3-19-2. South Carolina has limits on the State's liability under its Motor Vehicle Tort Claims Act of \$5,000 property damage, and \$30,000 for injury, S.C. Code § 15-77-230(d), although the State has authority to purchase liability insurance for its employees under a separate provision (*id.* § 1-11-140).

¹⁹⁶ See, e.g., Cal. Govt. Code § 825. Wisconsin allows a maximum recovery of \$100,000 in tort actions against local governments and their employees and provides that employees be indemnified for any defense or liability costs. Wis. Stats. Ann. § 895.46. The claim limit would not, presumably, be applicable to a § 1983 claim.

¹⁹⁷ See, e.g., Ann. Code of Md. Art. 32A § 12B. Some of the states which have complete Tort Claims Acts include Oregon, Ore. Rev. Stats. §§ 30.260-300; Iowa, Ia. Code Annot. ch. 25A; and Kansas, Kan. Stats. Annot. §§ 75-6101 to 6116. Although these Acts do not all follow the FTCA closely, they do have similar provisions. See, e.g., Ore. Rev. Stat. § 20.265(c), and Kansas Stats. Annot. § 75-6104(d), providing "discretionary function" exceptions, and Ia. Code Annot. §§ 25A.14(1) and (4), which are almost identical in wording to 28 U.S.C. §§ 2680(a) and (h), respectively.

¹⁹⁸ For example, where the court rules that the employee did not act in bad faith.

tort occurred outside the scope of employment or was committed in bad faith.¹⁹⁹

A potent source of uncertainty for officials facing a risk of liability is the exclusion in virtually every indemnity statute of reimbursement for actions committed in bad faith, variously defined by statute and variously construed by courts. Depending upon the State, indemnification may be denied in cases of "actual fraud, corruption, or malice";²⁰⁰ "willful or wanton acts or omissions";²⁰¹ "willful misconduct";²⁰² "malice or criminal intent";²⁰³ "malicious or fraudulent" acts;²⁰⁴ "gross negligence, fraud or malice";²⁰⁵ or some variation on the above. At least one State denies reimbursement if the official is subjected to disciplinary action, adding yet another element of uncertainty as well as potentially discouraging the use of administrative sanctions against officials.

These "bad-faith" exclusions create significant *lacunae* of uncertainty, but potentially large dimensions in state indemnification statutes. If indemnification is denied to state and local officials liable under § 1983 (or under state law) because they possessed a malicious intent to harm, this may not be a matter of concern; indeed, such an outcome could help to deter wrongdoing. But where liability rests not upon subjective bad faith but rather upon the finding of a judge or jury that an official has manifested "objective" bad faith under the amorphous standard of *Wood v. Strickland*, the matter is not so simple.

In sum, there are numerous restrictions on indemnification. Their aggregate effect is likely to be pervasive confusion and uncertainty, especially as changes in legal doctrine open up new areas of potential official liability that may or may not be covered by legislation enacted in an earlier day. Moreover, this ambiguity may be greatest in precisely those situations in which society has the greatest interest in encouraging vigorous decision making. Street-level officials, charged with the execution of our most fundamental social policies and values and prone to be especially risk averse, are even less likely than their superiors to be familiar with the details of indemnity statutes in their jurisdiction, much less judicial con-

¹⁹⁹ See, e.g., Cal. Govt. Code § 825.6.

²⁰¹ E.g., Colo. Rev. Stat. § 24-10-110(1).

²⁰³ E.g., Idaho Code §§ 6-903(b) and (c).

²⁰⁵ E.g., Utah Code Ann. § 60-30-4.

²⁰⁰ E.g. *ibid.*

²⁰² E.g., Ill. Rev. Stat., Ch. 24 § 1-4-5.

²⁰⁴ E.g., N.M. Stat. Ann. § 41-44-B.

struction of them.²⁰⁶ They may be aware of those cases, however rare, in which liability was imposed but no indemnity was paid to the errant official.

Of perhaps greatest concern, however, is the effect of such gaps in coverage upon adequate compensation of victims. In the absence of governmental liability—for example, where a state official offends but his employer enjoys sovereign or Eleventh Amendment immunity—a victim unfortunate enough to have been injured by an official whose “bad faith” precluded indemnification may be able to obtain, but not satisfy, his judgment. Similarly, where a judgment-proof federal official injures a citizen in the course of unconstitutional or otherwise illegal conduct not covered by the FTCA, the victim may simply have to chalk it up to the vagaries of immunity-liability law. Thus compensation may most elude those who have been most egregiously wronged.²⁰⁷

Thus, neither existing immunity rules nor present risk-shifting arrangements are likely to reduce the risks to the official of having to defend against damage actions or satisfy a judgment at some financial, psychic, and professional cost. Indeed, in some ways—for example, by lengthening the trial and creating additional anxieties over whether he will be properly defended and adequately insured or indemnified against loss—the risks may be increased. At the same time, these rules and arrangements do not assure victims of an adequate remedy.

IV

I have emphasized the impact of liability-immunity rules on vigorous decision making for several reasons. First, the Court's recent decisions, while advertent to the importance of that objective, have consistently fashioned rules that tend to discourage it. Second, neither the Court nor legal commentators have adequately addressed the implications for vigorous decision making of crucial

²⁰⁶ Even city legal officers handling a defendant's case may be uncertain about the availability of indemnity, or may be reluctant to give an unqualified opinion. The complexities of indemnification may even confuse triers of fact, whose findings may be affected, however improper that may be, by their beliefs about who is going to pay the actual cost. Some state statutes prohibit revealing the availability of indemnity to the jury. See, e.g., Idaho Code, § 6-903(f). On the other hand, there are (necessarily anecdotal) accounts of judges awarding sizable damages against federal employee under a mistaken impression that they would be reimbursed by their agencies. Interview with Dept. of Justice officials, note 183 *supra*.

²⁰⁷ See Berman, note 111 *supra*, at 1194.

determinants of official behavior discussed in parts II and III. Third, identifiable victims of official illegality are far more likely to seek and obtain remedies for their harms (inadequate as those remedies may sometimes be) than the silent victims of official self-protection. Moreover, this imbalance shows every sign of growing. If a course correction is indeed necessary, it should be undertaken sooner rather than later.

In this concluding part, I first argue that the existing system of official immunity-liability rules fails to attain levels of compensation which are both satisfactory and actionable, deterrence of wrongdoing, and other socially valued ends that such rules are supposed to maximize. Then, I sketch the contours of a regime of official immunity and liability rules that would, under reasonably attainable conditions, almost certainly produce a better mix of these ends.

A. THE FAILURE OF THE EXISTING SYSTEM

The present immunity-liability rules appear to undercut each of their avowed objectives, sacrificing vigorous decision making in favor of compensation and deterrence, but then frustrating these and other favored objectives as well.

1. *Compensating victims.* It seems incontrovertible that legitimate claims by citizens for injuries suffered at the hands of an increasingly interventionist government often go uncompensated. Plaintiffs seeking to recover damages against individual officials in § 1983 or *Bivens*-type actions apparently lose the vast majority of cases brought.²⁰⁸ Such statistics cannot, of course, conclusively demonstrate the extent to which valid claims were defeated. Nevertheless,

²⁰⁸ The only published empirical study, a sample of § 1983 actions against police in the United States District Court for the District of Connecticut, asserts that "serious doubts exist about the efficacy of section 1983 suits against the police." Project, note 173 *supra*, at 781, 782. This view is held by other observers. See, for instance, Newman, note 2 *supra*; Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 293 (1955). While "efficacy" is in the eye of the beholder, the data from the *Yale Law Journal* sample suggest the uncertainty of the authors' claim. Of 89 closed cases, less than 20 percent were dismissed on motions or on plaintiffs' voluntary dismissal without settlement, while 47 percent resulted in settlements out of court and another 26 percent resulted in verdicts for plaintiff after trial. See Project, *supra*, at 790, table 1. The study points out that of the 28 cases going to jury trial, plaintiffs prevailed in only eight and the average recovery in those cases was \$5,723. *Id.* at 789. Although the study characterizes these outcomes as demonstrating "relative infrequency of plaintiffs' verdicts" and "low damage awards," the apparent bases for comparison seem highly dubious. *Id.* at 789. The impression that there are few plaintiffs' judgments in *Bivens*-type cases is supported by an empirical review of 172 such cases in Note, "Damages or Nothing"—the Efficacy of the *Bivens*-Type Remedy, 64 CORNELL L. REV. 667, 694-95 (1979).

the very few commentators who have addressed this question have agreed that deserving victims often fail to obtain compensation.

Judge Newman's analysis of § 1983 litigation notes, for example, that plaintiffs tend to be poor and ill-equipped to maintain a protracted lawsuit; that they often cannot readily identify the person who injured them; that plaintiffs are far less likely to elicit sympathy from, or be credible to, a jury than defendants; that the defenses of qualified and absolute immunity result in the denial of many legitimate claims of injury; that the measure of damages for violations of constitutional rights is often quite inadequate; and that defendants in such cases are often judgment-proof or financially embarrassed.²⁰⁹

As we have seen, damage actions against government entities are also beset with obstacles, even for the plaintiff with a legitimate claim. States and their agencies enjoy Eleventh Amendment immunity from § 1983 liability for damages, except under certain limited conditions. Local, municipal, and regional administrative agencies are now subject to suit under § 1983, stripped of traditional immunities. Yet even here, several doctrinal impediments to recovery remain. The Court in *Monell* constructed the two most important of these out of whole cloth: there can be no governmental liability unless the injury was caused by an action taken pursuant to an "official policy" or "custom";²¹⁰ the governmental entity, in the Court's words, cannot be liable "solely because it employs a tortfeasor—or, in other words, [the entity] cannot be held liable under § 1983 on a *respondeat superior* theory."²¹¹ Thus, if the government can show that the illegal conduct, although well within the scope and under color of the official's authority, did not rise to the status of an official policy or custom, it can escape liability altogether.²¹² And where federal officials err or misbehave, the rem-

²⁰⁹ Newman, note 2 *supra*.

²¹⁰ 436 U.S. at 690, 691, 694. See Note, *Municipal Liability under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979).

²¹¹ 79 COLUM. L. REV. at 691.

²¹² For post-*Monell* cases so holding, see, e.g., *Reimer v. Short*, 578 F.2d 621 (5th Cir. 1978); *Zaragoza v. City of San Antonio*, 464 F. Supp. 1163 (W.D. Tex. 1979); *Randle v. Gokey*, 469 F. Supp. 452 (N.D. Ohio 1979). See also Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years after Monell*, 12 URBAN LAWYER 232, 240-57 (1980).

In *Monell*, the Court had no need to address either *respondeat superior* or nonofficial policy as bases for § 1983 liability, since the Court found that "unquestionably . . . official policy" was a "moving force" of the violation in *Monell*. 436 U.S. at 694, 701 n.66, 713. See opinion of

nants of sovereign immunity preserved by the Federal Tort Claims Act confound efforts by victims to recover. Finally, in addition to the barriers to compensation that derive from particular exceptions to and limitations upon remedies under § 1983, FTCA, and *Bivens*, there is a more generic obstacle to recovery, what Professor Mashaw has termed the "cause of action problem."²¹³ Certain forms of official misconduct, such as wrongful failure to enforce or wrongful approval or disapproval of products, some elements of tort liability—especially proximate cause, duty, and damages—are particularly difficult to prove.²¹⁴

2. *The deterrence-of-illegality objective.* The deterrent effect of rules and sanctions is notoriously difficult to assess. In the case of the damage remedy against individual officials, this difficulty is especially formidable, not only because such data do not exist but also because other potential sanctions for such conduct abound. Analytical tools for illuminating this question, however, are not wholly lacking.²¹⁵ Although the literature deals primarily with criminal sanctions, it is nevertheless suggestive.²¹⁶ For example, Professor

Justice Stevens, concurring in part. *Id.* at 714. The "official policy" issue was neither raised nor briefed and had not been discussed by the courts below. Schnapper, note 67 *supra*, at 215-16. The restrictions on municipal liability were reaffirmed more recently in *Owen*, 100 S. Ct. at 1418, n.39 and 1419 (albeit again in *dicta*). For critical views, see Schnapper, note 67 *supra*, at 215-40; Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979).

²¹³ See Mashaw, note 84 *supra*, at 29-33.

²¹⁴ In *Martinez*, 100 S. Ct. 553, the Court held that no cause of action under § 1983 would lie against state parole officials who had wrongfully decided to release the dangerous offender. Although the holding in *Martinez* reinforces plaintiff's "cause of action problem," its far-reaching suggestion that state law principles need not bind federal courts in § 1983 cases could ultimately strengthen the major liability-expanding currents in tort, administrative, and constitutional law that are steadily encroaching upon that barrier. As Professor Epstein has noted, modern judges increasingly allow such cases to go to the jury notwithstanding the causal complexity of plaintiff's case. Epstein, note 62 *supra*, at 165. And the Court has recently observed that "our notions of governmental responsibility should properly reflect" the evolution of tort law. *Owen*, 100 S. Ct. at 1419.

²¹⁵ See, e.g., ZIMRING & HAWKINS, *DETERRENCE* (1973); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Andenaes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L.C. & P.S. 197 (1952); PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). Economic analysis of criminal behavior, including the effect of sanctions, has burgeoned in the past ten years. Seminal works are Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973).

²¹⁶ One of the distinctions between the individuals who are the targets of the criminal sanctions that are usually the subject of deterrence studies, and the officials under consideration here is that the former act largely on their own while the latter almost always act in the context of an organization, which subjects them to many formal and informal constraints and

Oaks has developed a list of factors that, other things being equal, are likely to determine whether a particular sanction will be effective. These factors include: the risk of detection, conviction, and punishment; the individual's perception of the severity of the penalty; the extent to which the forbidden behavior is approved by the "relevant community" and to which conviction entails no loss of prestige; the extent to which the sanction is reinforced by a sense of moral obligation, the degree of personal motivation to engage in the proscribed conduct and the availability of alternative ways to achieve the same goal; the degree to which the rule is communicated to the target population; and the degree of clarity with which the rule is stated, especially regarding the circumstances in which it will be applied.²¹⁷

Oaks's factors provide a useful starting point for analysis in a domain that has long been marked *terra incognita*. In applying these factors to the street-level official, it is essential to recall not only the unique context in which he works—his distinctive work environment; the decision calculus that seems rational to him; the doctrinal rules that affect the probability of being sued and of personal liability; and his opportunities to shift the risk of liability to others—but also the organizational setting in which he acts.²¹⁸

The application of Oaks's factors to the street-level official is far from conclusive about the deterrent effect of rules. The "relevant community"—the street-level agency—often approves of the pur-

incentives. This organizational factor is important in the analysis of deterrence through civil liability. In this regard, the literature evaluating the deterrence value of the "exclusionary rule" is relevant. Leading studies include Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); SCHLESINGER, *EXCLUSIONARY INJUSTICE* (1977).

²¹⁷ Oaks, note 216 *supra*, at 724-25.

²¹⁸ The agency's patterns of supervision and disclosure will affect the probability that the illegal conduct by the official will be detected and communicated to the potential plaintiffs. The agency may, through its system of administrative sanctions or by linking its disciplinary sanctions to the outcome of damage actions, or otherwise, affect the official's perception of the consequences of misconduct.

The agency may well constitute the "relevant community," whose values and incentives will often be more authoritative than those enunciated by external sources such as courts. Where these incentives run counter to constitutional and legal norms, the impact of civil liability will be reduced. This is most frequently noted with regard to law enforcement officials, whose organizational aims—preventing crimes and apprehending perpetrators—can easily conflict with important constitutional values. Oaks, note 216 *supra*, at 727-28; SKOLNICK, *JUSTICE WITHOUT TRIAL* 219-20 (1967). In other settings the conflict may not be so sharp. The agency also plays a crucial role in communicating to the official the rules that are to influence his behavior. See, e.g., ZIMRING & HAWKINS, note 215 *supra*, at 141-57.

pose and result of the illegal conduct (*e.g.*, capturing criminals, maintaining control over prisoners), if not always its precise form (*e.g.*, seizing evidence illegally, using solitary confinement), for the conduct advances some salient goals of the organization.²¹⁹ This is likely to reinforce both the official's perception of the conduct as moral and his personal motivation to engage in it, especially if, as in certain law enforcement situations, no other legally valid way of achieving the end seems feasible. The illegality will often not be clear, reflecting the ambiguity of the rules the agency provides, the rapidly changing conditions under which those rules must be applied, and the conflicting signals that the agency in fact communicates. Moreover, the official can be deterred only insofar as he controls the principal elements of the decision context and thus could readily prevent the injury that he perpetrates. Yet the street-level official, even less than the highly constrained organization of which he is simply one part, often lacks that degree of control.

Oaks's first two factors—the risk that the sanction will in fact be imposed and the perception of its severity—play an uncertain role as applied to street-level officials. First, the data upon which the probability estimate is based are highly aggregated. They include all types of officials and all types of official conduct. In terms of the relative credibility of the parties, the financial resources of plaintiffs, and similar factors, a suit against a police or corrections official may bear little resemblance to a case brought by a public employee to challenge his dismissal or one brought by a company to challenge error or illegality by a regulatory official. Thus plaintiffs appear to recover with some frequency in the burgeoning area of public employment disputes.²²⁰ And the Court's recent *Thiboutot* decision will open up areas of litigation under § 1983—suits against state and local officials based upon statutory and regulatory violations in federal-state programs—that have been largely untapped and that

²¹⁹ Moreover, the low success rate of suits causes officials to regard them as being brought largely for harassment purposes. This was a nearly universal perception among the officials and organizations interviewed. In that case, even a successful suit against an official or agency may be seen as an unwarranted claim that somehow eluded the screening mechanism.

²²⁰ See, *e.g.*, *Woody v. City of West Miami*, 477 F. Supp. 1073 (S.D. Fla. 1979); *Eckerd*, 475 F. Supp. 1350; *McCormick v. Edwards*, 479 F. Supp. 295 (M.D. La. 1979); *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1979); *Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979); *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978); *Hawkins v. Board of Pub. Educ. in Wilmington*, 468 F. Supp. 201 (D. Del. 1979).

could produce a pattern of recoveries different from that in more traditional § 1983 litigation.²²¹

Second, the probabilities that an official will be sued and that he will have to go to trial are both considerably higher than the probability that he will ultimately be held liable or that the penalty will be severe. These more probable eventualities also entail significant costs, including the costs of defense (when not defrayed by the government), the psychological costs of uncertainty, and injury to reputation. Apprehension of these costs may increase deterrence.

Third, the official may advert less to the objective probability of being sued successfully than to the personally catastrophic nature of such an outcome, should it ensue. His estimate of the likelihood and expected (negative) value of such a low-probability event may be disproportionately influenced by the "horror stories" he has heard. Finally, even if the official perceives the probability of an adverse judgment as being quite low, he will still have both the incentive and the opportunity to decrease it further.

In sum, while one cannot say with certainty what deterrent effect the risk of being sued for damages has upon any particular type of street-level official (much less on officials generally), it is plausible to assume that the level of deterrence will be higher than the objective probability of an adverse, unindemnified, or uninsured judgment alone implies. Because of the many unjustified barriers to liability for illegal conduct, however, deterrence may still be below a socially desirable level.

3. *Other objectives.* Official liability rules fail on a number of additional grounds. Such liability does not spread the loss in question but merely shifts it from one individual to another. On both equity and efficiency grounds, we may prefer that the errant official bear it rather than the faultless victim, but neither alternative achieves the degree of loss spreading that seems both possible and socially desirable.²²²

The morality-affirming function of tort liability is often blunted when liability is imposed upon individual officials whose "objective bad faith" may consist of little more than being the visible manifes-

²²¹ For example, plaintiffs might be consumers, environmentalists, or disabled persons rather than prisoners or criminal suspects.

²²² See CALABRESI, note 89 *supra*, at 233. See also, *Owen*, 100 S. Ct. at 1419 ("the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct").

tations of immense, impersonal bureaucratic, political, and social processes over which they have no control. One may scorn the prison guard who says "I'm just doing my job" as he places a prisoner in solitary confinement, but in an important sense, he is. To hold the official liable may serve no purpose, if the constraints imposed by his work and organization context are so great that he cannot readily alter his behavior and still perform his task effectively.²²³ Even where he *can* change his conduct, the larger system of which he is merely a part may remain unchanged or his conduct may impose large costs on others.

Finally, the randomness of damage actions and of imposition of official liability, their infrequency relative to the occasions on which they *might* occur, will often be objectionable on equity grounds.²²⁴ This seems particularly unjust in the case of official liability because the official who acts and errs is almost always attempting to serve important social ends. Indeed, his organization may well support the behavior (informally, if not explicitly).

B. TOWARD A SUPERIOR SYSTEM OF LIABILITY AND IMMUNITY FOR OFFICIAL MISCONDUCT

No social system maintaining diverse objectives and subject to significant resource and political constraints can perform "optimally." Indeed, the very term, as applied to such systems, seems vacuous and circular. Nevertheless, the inadequacies of the current system seem so substantial that even one who maintains modest expectations concerning the performance of so complex a system may be justified in concluding that significant improvements can be made at a rather low social cost.

Progress, I believe, lies in simultaneously pursuing three paths: the substantial expansion of governmental liability, especially at the state level; the contraction of official liability; and the strengthening of systems of administrative control. These changes should be tightly integrated, a prescription that the current system—derived

²²³ See Lipsky, note 46 *supra*, at 184; SYKES, note 67 *supra*, at 61.

²²⁴ One has the sense from reading the cases and interviewing officials that being sued (and, *a fortiori*, being held liable) is much like being struck by lightning. See *Furman v. Georgia*, 408 U.S. 238 (1972); see also Jaffe, note 173 *supra*, at 212, discussing *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 216 (1961), in which Justice Traynor noted that with its many exceptions to liability, immunity "operates so illogically as to cause serious inequality."

as it is from a pastiche of constitutional commands, statutory provisions, judge-made rules, and diverse institutional arrangements—most decidedly violates.²²⁵ Indeed, failure to do so could conceivably deepen the current system's incoherence. For this reason as well as others, Congress rather than the Court should undertake this reshaping.²²⁶

The fulcrum of systemic reform is broadened governmental liability for official misconduct and the protection of individual officials, especially street-level officials, against the risks of being sued and held personally liable for damages. The immediate task is to demonstrate that this general approach is likely to achieve a mix of compensation, deterrence, vigorous decision making, and other socially valued ends superior to that generated by the current system.

1. *The consequences of expanding governmental liability and protecting officials against personal liability.* Quite apart from any change in the scope of official liability, the expansion of governmental liability would generate substantial, unequivocal, and relatively certain gains in the compensation of victims of official misconduct. Such victims could more readily identify the appropriate defendant; more readily bring suit; expect a more sympathetic hearing from a jury unconcerned about imposing liability upon well-meaning but errant officials of typically modest means; obtain a judgment reflecting the significance of the rights infringed; and be assured that judgments obtained would be fully satisfied. These considerable advantages, moreover, would accrue without significantly increasing the probability of an unjustified or erroneous award in any

²²⁵ Bermann, note 111 *supra*, at 1181-89, stresses the marked dissociation of official and governmental liability and immunity rules "[e]ven when legislatures undertake to restructure governmental tort law from bottom up"; Mashaw, note 65 *supra*, at 27 (noting the interrelationship between official and governmental immunity).

²²⁶ Many or most of the changes that I shall discuss could be effected through judicial decision. Indeed, the expansion of governmental liability that I propose has already been substantially advanced by Monell, Owen, and *Thiboutot*. Nevertheless, several considerations argue strongly in favor of Congressional rather than judicial reshaping of immunity-liability rules. These include the expectations and institutional arrangements that presumably have settled around earlier judicial pronouncements in this area (see, e.g., Owen, 100 S. Ct. at 1425, 1430-32) (Powell, J., dissenting); the inability of the Court to integrate the various components of a reformed system on a case-by-case basis; and the need for certain exceptions, trade-offs, institutional requirements, transitional subsidies, or other such arrangements that lend themselves to legislative disposition rather than to adjudication. See Fuller, note 34 *supra*. The Court has recently offered the lack of empirical data bearing upon such trade-offs as a reason for deferring to Congress. See *Ferri v. Ackerman*, 100 S. Ct. at 410.

particular case, because the changes would in no way alter the legal standard governing the propriety of the official's primary conduct but would merely increase the probability of compensation for those injured by conduct violating existing standards.

The gains in loss spreading would also be clear and significant. The loss occasioned by the illegality would be shifted from the individual (the victim or, if official liability has been imposed, the official) to a far larger group of taxpayers at the local, state, or federal level, as the case may be.²²⁷ Moreover, the moral principle implicit in the rule of conduct would usually be more strongly affirmed by imposing the loss upon the entity responsible for recruiting, training, guiding, constraining, managing, and disciplining the offending official (and many others like him) than by imposing the loss upon an individual official who is more anvil than hammer,²²⁸ or upon the victim. Finally, the randomness of liability—and the inequity it connotes—would be considerably reduced.

When we consider the effect of broader governmental liability upon the balance between deterrence and vigorous decision making, the assessment must become somewhat more equivocal. The difficulty is that deterrence and vigorous decision-making objectives are potentially in conflict. The pursuit of one usually diminishes the other at some social cost. Street-level officials often find themselves caught between these conflicting incentives and resolve the tension in ways that are rational to them but not to the larger society. Within their duty constraint, they are personal risk avoiders rather than social cost avoiders.

Legislatures and courts are not in a good position to resolve this discrepant perception. Legislative rules of conduct and liability are necessarily broad and categorical, rather than situational. While a court's decisions may be situation specific, it is relatively ill-suited to make judgments concerning the appropriate mix of deterrence and vigorous decision making. Insulated from the social preferences that should inform such judgments, a court can influence only a small portion of the relevant variables. Moreover, the prospect of adjudication is itself part of the problem.

²²⁷ Of course, this particular result could also be achieved through a system of official liability-cum-indemnification or insurance provided by the governmental entity.

²²⁸ The analogy to *respondeat superior* liability of the employer in private tort law is, of course, a close one.

The responsible government agency is in a far better position than the solitary official to determine and pursue adequate levels of both deterrence and vigorous decision making. First, it is only there, at the level of some governmental entity, that the critical ingredients of an optimal mix of deterrence and vigorous decision making can converge: the ability to perceive and weigh the full array of social values at stake; the incentive to act upon that perception and weighing; and the resources to implement it effectively. The police agency, for example, is best situated to identify and evaluate the precise balance of deterrence and vigorous decision making that is likely to result from alternative deployments of police officers or from different guidelines for making arrests of suspicious characters.²²⁹

Second, the political environment in which the agency functions limits both its ability and its inclination to adopt risk-minimizing strategies that sacrifice important public and programmatic values to narrow agency self-interest. This political constraint operates far more strongly upon the incentives of the agency than upon those of the street-level employee. Politicians and the public, after all, expect the agency to control crime as well as respect constitutional rights, educate students as well as discipline them, and protect the community from mental patients that need hospitalization as well as release those that do not. More important, these expectations are enforced, to a greater or lesser extent, by a broad array of sanctions that tend to operate more readily and effectively against agencies (or the government as a whole) than against individuals.²³⁰ And even those that operate against individuals are capable of being tailored to strike a more refined balance between deterrence and vigorous decision making than the privately initiated damage action against officials permits.²³¹

None of these sanctions, of course, is fully effective in both deterring illegality and in encouraging vigorous decision making;

²²⁹ See McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972), Amsterdam, note 216 *supra*.

²³⁰ These include declaratory and injunctive orders; the Federal Tort Claims Act; evidentiary exclusionary rules; judicial review of illegal actions either directly or in enforcement proceedings; hearings by legislative committees to reverse illegal actions and expose, embarrass, and punish wrongdoers; electoral defeat in the case of certain top officials; loss of federal aid; professional criticism and media exposés.

²³¹ These include declaratory and injunctive orders, criminal prosecution, disciplinary sanctions under agency or Civil Service regulations, and professional criticism and discipline.

few of them can make the victim whole. But taken together, they constitute a flexible and potent arsenal of weapons for optimizing the relevant social values. Some sanctions, such as criminal prosecutions, are actuated by politically accountable agency officials who may be expected to reflect the dominant political culture. Others, such as injunctive relief, are actuated by aggrieved citizens who need not be bound by that culture. Most sanctions depend for their invocation upon a confluence of initiatives undertaken by agency officials, nonagency officials, and citizens. Despite the varied and flexible combinations of sanctions for official misconduct, however, the Court often discusses the damage action against individual officials as if society's ability to compensate for and deter official misconduct depended entirely upon the availability of that remedy,²³² as if the existence and effectiveness of other sanctions were simply irrelevant to the formulations of sound official immunity-liability rules.²³³

Finally, the agency controls most of the resources, constraints, incentives, and conditions that actually shape the official's behavior. Within the agency's own limitations, it can recruit certain types of personnel for official positions; train and retrain those officials to perform their duties in particular ways; reward and punish them for conforming to or departing from those norms; provide appropriate modes of supervision and control; provide the appropriate mix of rule-based guidance and discretion; provide more or better information of one kind or another; experiment with different forms and combinations of recruitment, training, information, exhortation, and sanctions; and seek changes in the governing rules or in the resources available to the official. Moreover, the agency can deploy those resources and incentives from a perspective that takes account of a broader range of social interests than the street-level official is likely to consider and yet remain sensitive to the practical imperatives of the street-level task.

The agency's interests and those of society, or course, will seldom be perfectly congruent. Indeed, the strong tendency of those interests to diverge is as well established as any phenomenon in political life.²³⁴ The divergence between the interests of a particular

²³² This occurred most notably and recently in *Carlson*, 100 S. Ct. at 1472-74.

²³³ See *Bivens*, 403 U.S. at 397; Jaffe, note 173 *supra*, at 214.

²³⁴ The extent of that divergence depends upon many factors, especially upon the fiscal, legal, informational and other constraints within which the agency functions and upon the

actor (enterprise or individual) and society is not, of course, confined to the public sector. Liability rules are typically designed to internalize the costs of private behavior, thereby bringing private and social costs into harmony. Can such rules similarly internalize the costs of official conduct to produce an analogous convergence of agency and social interests in the balance between deterrence and vigorous decision making?

Three problems present themselves. First, it is often unclear where the optimal point of leverage in the governmental apparatus lies. If the United States Treasury is too remote from the relevant behavior, the smallest bureaucratic unit of which the employee is a part may be too close and lacking the resources to influence the behavior. But even when the optimal leverage point is identified, efforts to impose fiscal responsibility at that point may be frustrated. An agency cannot ordinarily retain the fruits of any "efficiencies" that it manages to institute; those savings will return to the Treasury where the agency will have no special claim on them. Similarly, the costs of adverse judgments resulting from official misconduct are borne by the Treasury rather than by the particular budget of the agency whose employee violated the law. Much the same is true, of course, of the private firm. Smaller units within the private enterprise will be affected only to the extent that the enterprise, faced with new incentives as a result of enterprise liability, transmits those incentives to the smaller units which are best positioned to influence the primary conduct.

A third problem seems especially difficult for public enterprises to solve. Because of the highly politicized, strategic, and discretionary behavior that surrounds much budgetary policy in the public sector, a decision to charge the appropriate agency's budget with the costs of defending claims and paying adverse judgments arising out of its employees' activities would be easy to evade and difficult to enforce. For similar reasons, an agency could not readily transmit to the appropriate subunit or particular employees the fiscal incentives created by the government liability rule. Also, in attempting to do so, the agency would risk influencing its employees in ways that would induce in them the same personal optimizing strategies that official liability can spawn.

incentives that animate it. Organizational maintenance goals inevitably compete with programmatic or broader social goals. See, e.g., NISKANEN, note 39 *supra*; DOWNS, note 39 *supra*; ALLISON, note 39 *supra*; HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY (1974).

Congress could of course require that the costs of governmental liability be charged to the budget of the agency that occasioned it and that the agency transmit those costs downward to the appropriate subunit within the organization. At that level the risk of liability would probably loom large enough in relation to the subunit's budget to create incentives on its part to shape official conduct in socially desirable ways. Nevertheless the open-ended, fluid, political nature of the budget process leads one to doubt that this scheme would be fully effective. For this reason, it should be augmented by attempts to strengthen other incentives on the part of agencies to control employee misconduct, incentives that are not in the first instance budgetary in nature.

These considerations suggest that expanding governmental liability could—but would not necessarily—improve the mix of deterrence and vigorous decision making that now obtains. More significantly, however, expanded governmental liability is most unlikely to worsen that mix. And if that is true, the justification for such a reform could rest upon its likely salutary effects upon compensation, loss spreading, morality affirming, and equity—a strong foundation indeed.

2. *Alternative models for expanding governmental liability and protecting officials against personal liability.* Assuming that it is desirable to expand governmental liability and to protect officials from the risk of personal liability, there are, broadly speaking, three ways in which this might be accomplished. First, official liability could be retained or even broadened, so long as the agency or other governmental entity either insured or indemnified the official for any costs associated with personal liability. Under this model, governmental liability *per se* would not be extended and might even be contracted. A second model would be the same as the first, except that governmental liability *per se* would be broadened. In the third model, governmental liability would be expanded and official liability would be contracted (or eliminated entirely).

Each of the three principal models, by relieving the official of the costs associated with being sued or held liable for damages, responds to the problem created by the current configuration of immunity-liability rules. Each would constitute an improvement over the current system, which combines broad official liability that is not fully insured or indemnified with narrow governmental liability.

Nevertheless, these approaches would not function alike, and

there are reasons for favoring the third model, *i.e.*, expanded governmental liability and contracted official liability, over the other two. To begin with, it is not at all clear that Congress could compel state and local governments to insure or indemnify their officials (the first and second models) without raising serious constitutional issues under the Tenth Amendment.²³⁵ Moreover, insurance contracts and indemnification laws would, unless proscribed by statute, contain a variety of exceptions to and limitations upon coverage. Such provisions, like the "good-faith" test for qualified immunity and similar tests under federal, state, and local indemnification arrangements, inevitably create new boundary problems, concerns about coverage, and the possibility of an "action over" by the government against the official. (Indeed, insurance and indemnity are likely to exclude precisely those instances of misconduct in which coverage is most needed to compensate victims.) These uncertainties are likely to resurrect the personal risk-minimizing behavior that these reforms are designed to obviate, while frustrating compensation and loss-spreading objectives by excluding governmental liability and forcing victims to proceed against individuals who may be judgment-proof. In addition, there is evidence that municipalities experienced serious difficulties in obtaining insurance coverage for official liability at a time when exposure to such liability was far more limited than it is today. Thus, to require insurance or indemnification might well amount to requiring governments to self-insure, a situation that would not be very different than one of direct government liability.²³⁶ Finally, insurers underwriting the risks of liability for official misconduct would presumably want to influence agency policy and personnel decisions that affected the

²³⁵ See *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Usery* dealt with an exercise of the commerce power, whereas the measures discussed here, aimed at furthering the aims of § 1983, would exercise powers granted to Congress under § 5 of the Fourteenth Amendment, which provides a different basis for expanding the federal role relative to that of the States. Tenth Amendment concerns could possibly be allayed as well by making adoption of an indemnity provision a condition for receipt of federal grants, rather than a direct requirement imposed on the States. Whether this would constitute sound policy is a different question.

²³⁶ During the mid-to-late 1970s, even before the *Monell* decision, municipalities began to experience difficulty obtaining liability insurance. The reluctance of carriers to offer such insurance was attributed to factors ranging from poor data on exposures and increased uncertainty due to changing legal doctrines to alleged manipulation of the market. In response, some cities had to adopt self-insurance plans or formed risk-sharing pools. See NATIONAL LEAGUE OF CITIES, *THE NEW WORLD OF LIABILITY* (1978). This situation will surely be exacerbated after *Thiboutot* and *Owen*.

magnitude of those risks, a form of private interference with public administration that would often be politically and morally objectionable.

Some, but not all, of these objections would be met by the second model (insured official liability with expanded governmental liability). Compensation of victims, for example, would be assured. The second model, however, would seem to be inferior to the third model (expanded governmental liability with contracted official liability) in all respects. If victims are to have recourse to a "deep pocket" defendant anyway, there is little reason to retain an official liability that is not necessary to compensate, that will cost something to insure against, that will (because of continuing uncertainties about coverage) discourage vigorous decision making to some degree, and that is unlikely to achieve greater deterrence than the third model.

3. *Implementing expanded governmental liability.* In my view, only one consideration can justify limiting the duty of government to respond in damages for the illegal conduct of its employees: the danger of permitting courts and juries to second-guess the necessarily discretionary decisions of governmental officials. This concern is based both upon separation of powers considerations and prudential ones.

In *Owen*, the Court majority discussed the separation of powers objection to governmental liability in the context of a constitutional tort. The Court began by noting:²³⁷

A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy—decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in this guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government.

Having acknowledged the problem, however, the Court quickly dispatched it:²³⁸

²³⁷ 100 S. Ct. at 1414.

²³⁸ *Id.* at 1415. For a similar response to the problem in the context of the discretionary function exception of Federal Tort Claims Act, see *Myers and Myers, Inc. v. U.S. Postal*

But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

The Court's argument, of course, both proves too much and avoids the core of the problem. It applies as much to the question whether the government entity has conformed to regulations and common law as it does to whether it has "conformed to the requirements of the Federal Constitution and statutes." Furthermore when the governing legal standards are as ambiguous and indeterminate as many Constitutional formulations, statutory and regulatory provisions, and common-law standards are, a court's application of such standards necessarily involves second-guessing the discretionary decision and "interfer[es] with the . . . government's resolution of competing policy considerations." To suggest otherwise is disingenuous in the extreme.

The real question—the question that the Court conceals in the quoted passage from *Owen*—is which institution, the agency or the judge-jury, should make the kinds of discretionary decisions that administrative agencies routinely are called upon to make? The answer—that executive officials should exercise their discretion but only in conformity with the law—is obvious. Its institutional implications, however, are not. The judge must say what the law is, and the judge or jury must apply it to the particular facts, both of which functions, especially the latter, trespass upon the discretion of the decision-making official.

Separation of powers analysis cannot take one much beyond the point at which the dilemma is restated. Prudential considerations, however, can. The distinctive competence of judges presumably lies in their ability to evaluate complex fact situations and derive

Service, 527 F.2d 1252, 1261 (2d Cir. 1975): "It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally." See also *Birnbaum v. United States*, 588 F.2d 219, 329 (2d Cir. 1978), which held that actions plainly outside an agency's statutory scope of authority could not fall within the "discretionary function" exception of the Act. This would suggest that an unconstitutional act is likewise outside the protected range of discretion, but the court explicitly chose not to reach that question. *Contra*: *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972).

principled decisions from a very small number of relevant normative premises in an atmosphere relatively free of external pressures. A jury is distinguished by its ability to bring a diverse and collective human experience to bear in finding a relatively simple set of facts and in evaluating conduct to which that experience is relevant. An official exercising discretion is best able to evaluate complex facts from a professional situation-specific perspective and to weigh a relatively large number of competing considerations in arriving at a judgment. The tasks appropriate to each, moreover, reflect not simply distinctive competence but democratic norms and traditions governing the ways in which each is appointed, monitored, controlled, and brought to account.

These considerations imply that discretionary decisions of officials should be reviewed by judges and juries only where some criterion for evaluating such decisions has been specified for the court. Where criteria have not been provided, or are so numerous that they would justify virtually any outcome, the decision should be immune from challenge in a damage action. This test, of course, contains an irreducible core of indeterminacy and ambiguity. Nevertheless, it has proved quite serviceable in at least two cognate forms. The first is the provision in the Administrative Procedure Act precluding judicial review of actions "committed to agency discretion by law."²³⁹ The second is the notion of a "discretionary function," a concept embodied in an express exception to liability under the FTCA.²⁴⁰ Thirty-five years of judicial decisions have elaborated each of these tests into workable, relatively determinate legal categories.²⁴¹

The immunity from governmental liability for "discretionary" decisions should, in the interests of compensation, deterrence, loss spreading, and other values that have been discussed, be construed as narrowly as possible consistent with the considerations justifying such an exception. This principle suggests a number of far-reaching

²³⁹ 5 U.S.C. § 701(a)(2).

²⁴⁰ 28 U.S.C. § 2680(a). I would not retain the provision in its current form.

²⁴¹ For decisions construing 5 U.S.C. § 701(a)(2), see, e.g., *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971); *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958). For a review of decisions construing 28 U.S.C. § 2680(a), see *Harris & Schnepfer, Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161 (1976); Note, *The Discretionary Function Exception to the Federal Tort Claims Act*, 42 ALBANY L. REV. 721 (1978); Case Comment, *Scope of the Discretionary Function Exception under the Federal Tort Claims Act*, 67 GEO. L.J. 879 (1979).

changes in the existing rules of governmental liability and immunity. The FTCA carves out a number of exceptions to federal governmental liability; some are quite broad, the others quite specific. I consider only the broad ones here.

The FTCA does not apply to "any claim . . . based upon the exercise or performance or the failure to exercise a discretionary function or duty . . . whether or not the discretion involved be abused."²⁴² Although the legislative history of the FTCA advances no rationale for the exception but simply provides examples of its application,²⁴³ its purpose is evident enough: to avoid giving courts influence over the discretionary judgments lodged elsewhere, thereby encouraging vigorous decision making by agencies.

In two respects, the FTCA "discretionary function" exception is broader than necessary. First, it is difficult to see why the immunity should be extended to abuses of discretion. The courts can—and routinely do—review discretionary agency decisions for abuses of discretion where substantive or procedural criteria for determining abuse exist.²⁴⁴ While there is some risk that courts will use this standard to intrude excessively into the domain of agency judgment, that risk seems rather minimal and worth running in the interests of confining the immunity. A second problem with the statutory exception is that some courts have construed it far more broadly than is justified, given the competing interests at stake.²⁴⁵ The term should be given a more restricted meaning in the FTCA context, limited to nonroutine, substantially judgmental, policy-type decisions.²⁴⁶

The FTCA applies only if the act or omission in question would be tortious under the law of the State where it occurred; thus, even

²⁴² 28 U.S.C. § 2680(a).

²⁴³ H.R. Rep. No. 1278, 79th Cong., 1st Sess. 5-6 (1945).

²⁴⁴ See, e.g., the APA, 5 U.S.C. § 706(a)(A); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *First Girl, Inc. v. Regional Manpower Adm.*, 499 F.2d 122 (7th Cir. 1974); *Overseas Media Corp. v. McNamara*, 385 F.2d 308 (D.C. Cir. 1967).

²⁴⁵ See, e.g., *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977); *Kiiskila*, 466 F.2d 626; *American Assn. of Commodity Traders v. Dept. of Treasury*, 598 F.2d 1233 (1st Cir. 1979).

²⁴⁶ The Administration has sponsored legislation in the 95th and 96th Congresses that would, *inter alia*, require the United States to waive the "discretionary function" exception altogether in constitutional tort cases, since that provision has been seen as a significant obstacle to attempts to direct a *Bivens*-type claim against the government rather than an individual official. Surprisingly, this proposal received no discussion in legislative hearings on the bill. It is not clear why this change ought to be confined to constitutional torts. See Hearings, note 18 *supra*.

a constitutional tort is immune from FTCA liability unless it can be framed as a state law tort.²⁴⁷ However justified this limitation may have been when the FTCA was enacted,²⁴⁸ the recognition of constitutional torts in the aftermath of *Bivens* and the massive growth in federal statutory and regulatory law argue strongly for its repeal.²⁴⁹

Until 1974, the FTCA immunized most intentional torts, including those most likely to be committed by federal officials. After *Bivens*, the Act was amended to permit claims "arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" by federal "investigative or law enforcement officers."²⁵⁰ Thus, torts such as libel, slander, misrepresentation, deceit, or interference with contracts rights are immune as well as the above torts, if committed by non-"investigative or law enforcement officers." This exception is both unexplained²⁵¹ and inexplicable. It has also produced apparent injustices²⁵² and is contrary to the strong trend in private tort law. It should be repealed.

The FTCA applies only to acts or omissions that are "negligent or wrongful."²⁵³ The Supreme Court has held that actions that would be tortious under state law only under strict liability principles are immune under the FTCA.²⁵⁴ In view of the transformation of tort law since the FTCA was enacted, the question of strict liability under the FTCA is ripe for examination.²⁵⁵ At the very

²⁴⁷ 28 U.S.C. § 1346 provides for liability where a private person would also be liable. Most constitutional restrictions do not apply to private individuals. See *Carlson*, 100 S. Ct. at 1474.

²⁴⁸ The legislative history is not helpful in this regard.

²⁴⁹ Because liability under the FTCA is tied to liability under state tort law, most courts have held that an FTCA suit may not be brought directly under the Constitution. Courts have, however, often preserved constitutional tort claims by contriving state tort law analogies. See, e.g., *Birnbaum*, 588 F.2d 219; *Myers & Myers, Inc. v. U.S. Postal Service*, 527 F.2d 1252 (2d Cir. 1975).

²⁵⁰ 28 U.S.C. § 2680(h); Pub. L. 93-253; § 2, 88 Stat. 50, March 16, 1974.

²⁵¹ See Boger, Gitenstein, Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C. L. REV. 497 (1976).

²⁵² E.g., *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975); *Rey v. United States*, 484 F.2d 45 (5th Cir. 1973).

²⁵³ 28 U.S.C. § 1346(b).

²⁵⁴ *Nelms*, 406 U.S. 797.

²⁵⁵ For earlier discussions of absolute liability see Peck, *Absolute Liability and the Federal Tort Claims Act*, 9 STAN. L. REV. 433 (1957); Jacoby, *Absolute Liability under the Federal Tort Claims Act*, 24 FED. B.J. 139 (1964); Abend, *Federal Liability for Takings and Torts*, 31 FORDHAM L. REV. 481 (1963). For post-*Nelms* criticism, see Note, *Utility, Fairness, and the Takings Clause: Three Perspectives on Laird v. Nelms*, 59 VA. L. REV. 1034 (1973); Peck, *Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391 (1973); Reynolds, *Strict Liability under the Federal Tort Claims Act: Does "Wrongful" Cover a Few Sins, No Sins, or Non-Sins?*, 23 AM. U.L. REV. 813 (1974).

least, compensation, deterrence, efficiency, and loss-spreading objectives reinforce the argument that a compensation scheme that relies as heavily upon state tort law as the FTCA does should not immunize the limited and relatively well-defined categories of activity that generate strict liability under applicable state law.

The possibility of a "good-faith" defense to liability under the FTCA only assumed real significance after 1974, when intentional torts of law enforcement officers first became actionable. At least one appellate court has recognized that defense in a case involving an alleged constitutional tort.²⁵⁶ Because of the availability of an exception for discretionary functions and for reasons discussed below in connection with governmental liability under § 1983, however, no such defense under the FTCA should be permitted.²⁵⁷

Adequate compensation of victims requires not merely that liability be established but that the judgment awarded make the victim whole. Deterrence of wrongdoing requires that damages be not merely nominal. Because constitutional rights are difficult to monetize, however, the measure of damages for violations is often inadequate.²⁵⁸ Moreover, punitive damages are expressly prohibited by the FTCA.²⁵⁹ Congress should devise a schedule of minimum liquidated damages in order to ensure adequate compensation and deterrence in such cases.

Improving the measure of damages, however, will not fully compensate victims. Whatever the justification for the "American rule" barring the shifting of litigation costs between private parties, it should not apply to a case in which a citizen has demonstrated that his government has violated his legal rights. It is in the public interest that such suits be brought and that such persons be made whole. The availability to a successful plaintiff of an award of reasonable counsel fees and other litigation costs in civil rights cases brought under § 1983²⁶⁰ and in numerous other federal statutory causes of action renders anomalous the absence of such a provision in the FTCA.

²⁵⁶ *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978).

²⁵⁷ For criticism of *Norton*, see Comment, *FTCA: Liability of U.S. for Torts Committed in Good Faith by Federal Law Enforcement Officers*, 63 MINN. L. REV. 1293 (1979).

²⁵⁸ See, e.g., *Carey v. Phipps*, 435 U.S. 247 (1978); *Fact Concerts v. Newport*, 626 F.2d 1060 (1st Cir. 1980), cert. granted 101 S.Ct. 782 (1980).

²⁵⁹ 28 U.S.C. § 2674.

²⁶⁰ 28 U.S.C. § 1988, as amended by the Civil Rights Attorneys Fees Act of 1976, P.L. 94-559, 90 Stat. 2641.

With respect to suits against governmental entities under § 1983, the Court's recent decisions in *Monell*, *Owen*, and *Tibbouts* have significantly expanded the potential scope of governmental liability. In general, these decisions have prodded the law in a desirable direction, reducing *pro tanto* the necessity to rely upon official liability to achieve compensation, deterrence, loss spreading, and other objectives. In some important respects, the Court has not gone far enough in this direction. In at least one respect, however—*Owen's* elimination of any immunity for local governments—it has exceeded proper bounds.

The immunity of state governments under the Eleventh Amendment from liability for damages for violations by their agents of federal rights of citizens remains a serious anomaly, one that has only been aggravated by *Monell* and *Owen*. Quite apart from whether a court should construe § 1983 to permit damage awards against States—a possibility at least temporarily laid to rest in *Quern v. Jordan*²⁶¹—it seems clear that Congress could amend § 1983 to do so if it wished.²⁶² State liability would advance compensation, loss spreading, equity, and perhaps deterrence and vigorous decision making as well. The State is the source of power and authority for those officials and local governments that are liable under § 1983 for infringing federally created rights. The State is already subject to suits for declaratory and injunctive relief, and indeed to suits for certain kinds of monetary relief. The *officials* who act as the State's agents are liable for damages under § 1983. The Eleventh Amendment does not immunize local governments which are creatures and arms of the State; *Monell* and *Owen* subject them to damage liability under § 1983. No doubt extension to the States of liability for damages under § 1983 would affect certain financial and legal relationships between state governments, local governments, and the employees of each. Similar adjustments, however, have been necessitated by many previous judicial and legislative changes in the law, and in any event could be facilitated by transitional arrangements.

I have criticized the dicta in *Monell* (reaffirmed in *Owen*) that local governmental liability under § 1983 does not extend to actions that

²⁶¹ 99 S.C. 1139, 1147 (1979).

²⁶² The argument has been fully developed elsewhere. See, e.g., Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978); Schnapper, note 67 *supra*, at 254, n.222. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

were not taken pursuant to "official policy" and that such liability cannot be based solely upon *respondeat superior* principles. Those principles constitute unwise policy, by leaving official liability to perform those functions that governmental liability could discharge more effectively. These restrictions should be eliminated or narrowed.

One additional restriction deserves mention. Both *Monell* and *Owen* involved constitutional torts, and their holdings expanding governmental liability may in the future be limited to such cases. After *Thiboutot*, however, which extended § 1983 to nonconstitutional claims, the legal argument for such a limitation is considerably weakened and seems unwarranted as a matter of policy.

I have maintained that the preservation of an exception to governmental liability for discretionary decisions, if properly confined, is essential for both separation of powers and prudential reasons. *Owen* violates this prescription. Elimination of a "good-faith" immunity, which *Owen* accomplished, is consistent with the objections to that defense discussed in Part III. But by failing to replace it with a properly cabined immunity for discretionary decisions, *Owen* purchases more certain compensation at too high a price in other values. Congress should modify the *Owen* rule *pro tanto*.

4. *Contracting official liability.* If governmental liability were expanded as suggested, the rationale for continuing to permit damage actions against individual officials would be weakened. Compensation and loss spreading would clearly be enhanced and moral affirmation and equity would arguably be advanced as well. The balance between deterrence and vigorous decision making, as we have seen, would not obviously be worsened and might even be improved.

Yet even in these circumstances, the arguments for retaining official liability are tempting. First, many plaintiffs would still feel that personal liability could satisfy their desire for retribution, affirm their belief in individual responsibility, and vindicate their dignity in a way that governmental liability could not. In particular, it may seem desirable that, at the very least, the truly malicious official, the person who acted in subjective bad faith (in the *Wood* sense), receive severe and individualized punishment. Unfortunately, no litmus test can enable a judge to distinguish in advance of trial the malicious from the merely hapless or zealous. To require officials to stand trial simply on allegations of malice can only increase the defensiveness, perception of random injustice, and in-

stinct for self-protection in the face of uncertainty that threaten vigorous decision making. Other sanctions for the malicious, such as criminal prosecution, may accomplish moral, punitive, and deterrent objectives more effectively, and with fewer adverse side-effects, than the damage remedy.

Another reason for wishing to retain official liability is the belief that a system of expanded governmental liability will simply not deter as effectively as official liability. I have suggested that deterrence and vigorous decision making are related in complex ways and that the deterrence achievable under a system of expanded governmental liability depends primarily upon the extent to which the costs of liability can be transmitted downward in the organization. By the same token, vigorous decision making will be limited to the extent that official liability remains available, plaintiffs retain strategic incentives to join officials as defendants even when governmental liability is available, and gaps remain in the comprehensiveness of the system of governmental liability or in the ability of officials to shift the risks of liability to the public (through indemnification, insurance, and/or free legal defense).

In short, no clear answer can be given to the question of how much official liability ought to be retained in a system of expanded governmental liability. The answer will depend upon the trade-off between deterrence and vigorous decision making that we are prepared to make, a trade-off that will in turn be affected by the ability of government to control the conduct of its officials through the transmission of both budgetary and nonbudgetary incentives to comply with the law.

5. *Strengthening administrative controls over officials.* The capacity of agencies to achieve the desired mix of deterrence and vigorous decision making in any regime depends primarily upon their ability—and their willingness—to influence the conduct of their employees. To the extent that governmental liability supplants official liability and liability-induced budgetary incentives are ineffective in shaping that conduct, the demands upon this ability and willingness will increase.

The question how to achieve a system of administrative control has spawned a vast and growing literature.²⁶³ For present purposes, I stress a few requirements particularly relevant to the present

²⁶³ On administrative control mechanisms in the private sector, see BARNARD, note 51 *supra*; SIMON, note 39 *supra*; on those in the public sector, and possible differences from the private sector, see BLAU, note 42 *supra*; KAUFMAN, note 48 *supra*; WILSON, note 28 *supra*.

inquiry. The system must be flexible and responsive. This implies that it should control a broad array of inducements, sanctions, and dispute resolution techniques, and should be sensitive to the operating realities and constraints of the official on the street. It must be widely perceived as just and impartial. This implies that it must enjoy the confidence of the community of potential victims as well as the community of potential offenders. Finally, unless the agency budget can be made to bear the financial burden of liability, the system must be linked to the tort process. This implies that where the agency is held liable for the misconduct of an employee, there is some assurance that disciplinary sanctions will in fact be imposed.

It is not possible to formulate a general evaluation of administrative control mechanisms. I confine myself here to discussing conflicts that must be addressed if nontort, nonbudgetary control mechanisms are to be adequate to the demands that would be placed upon them by an expansion of governmental liability (especially if official liability were contracted). Perhaps most difficult among these conflicts is that between the powerful desire of the street-level agency to control its own disciplinary processes, and the need for public confidence, especially on the part of those who are (or perceive themselves as) victims, in both the integrity of the process and the willingness of the agency to employ it vigorously. At its highest levels, where the external constraints upon the organization are most keenly felt and public criticism and political sanctions are most deeply feared, an agency is highly motivated to maximize the degree of autonomy with which it can function. Employee misconduct, especially where serious and visible harm can result to the public, can be damaging and can easily activate these constraints and sanctions. As a result, the quest for autonomy is often focused on the disciplinary system. This is especially true of street-level agencies, such as the police, that perceive themselves to be embattled by hostile and implacable forces on the street and misunderstood by politicians, the general public, and special publics such as judges or prosecutors. To such agencies, control over the disciplinary process seems essential to the morale and sense of mission of their employees.

Victims, for their part, are likely to view a self-contained, autonomous process as illegitimate and to view its outcomes as so much whitewash. When victims are members of ethnic or other groups

deeply suspicious of the fairness of the agency, this attitude may be deeply rooted and intractable. They will press for participation in, if not control over, the disciplinary process. Politically influential groups may succeed. In general, several forms of involvement are possible: outside review of citizen complaints; creation of a position or unit within the government designed as a representative of potentially aggrieved persons; and enablement of aggrieved individuals to actuate the disciplinary process in ways going beyond the mere filing of a complaint. Each has its virtues and defects; none has been fully satisfactory.

The classic example of the first form is the civilian complaint review board. A number were created at the local level during the 1960s in an effort to reduce tensions between the police and the public, especially minority groups, some had been established much earlier.²⁶⁴ Citizen complaint review boards have generally been designed to work independently of the judicial system. The bringing of a complaint by a citizen appears to be unrelated to, and have no effect upon, the same citizen's right to bring a tort action. Where internal action is linked to tort liability, the problem of agency compliance might not be so great. The existence of unlawful activity having been established in court, it would be more difficult for an agency to resist the disciplinary recommendations of a review board.

It appears that the effectiveness of such boards has been severely hampered, however, by the strong opposition of the police, and the boards have often been abolished.²⁶⁵ Clearly, the particular auspices under which the review board operates are critical both to its perceived usefulness to complainants and its threat to official autonomy. Whereas injured citizens may be skeptical about lodging a complaint with the same agency that has caused their grievance,

²⁶⁴ On the history of and experience under these boards, see J. Hudson, *Police Review Boards and Police Accountability*, 36 LAW & CONTEMP. PROB. 515 (1971); Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909 (1969); Note, *Reviewing Civilian Complaints of Police Misconduct*, 48 TEMPLE L.Q. 89 (1974); Brent, *Redress of Alleged Police Misconduct*, 11 U.S.F.L. Rev. 587 (1977).

²⁶⁵ The antipathy of law enforcement toward civilian review has been so great that one commentator concluded that "the ill-feeling the institution provokes may not be worth the benefit it confers." Note, 35 VA. L. REV., note 264 *supra*, at 943. New York established a board in July 1966, but it lasted only four months until it was abolished by a referendum. Philadelphia's board lasted over ten years, but was hampered by limited staff and enforcement powers. It was eventually terminated under a court injunction sought by the local policemen's association. New York's complaint review board was continued under internal agency control.

the external review board, by providing a more impartial forum for the airing of complaints against officials, appears to encourage the filing of complaints.

The need for an external review agency may vary depending upon the official behavior under attack. The police may be an extreme case in terms of both the potential for infliction of physical harm and the degree of community mistrust. For other officials, the problem of accountability may not be as great, and internal review may be more satisfactory. But other things being equal, the mutual acceptability—and thus the effectiveness—of civilian complaint review boards will probably be least in those situations in which the need for disciplinary mechanisms is greatest, and vice-versa. For this reason, more limited variants of the idea—such as the inclusion of a minority of civilians on a disciplinary body composed of a majority of officials, or a system of arbitration by a mutually agreeable panel—may be more promising.

The second form of outsider influence is exemplified by various kinds of "advocates" located within the governmental (though not necessarily within the particular agency) structure and enjoying some degree of independence from the agency in question. In some cases, these advocates are prosecutorial in nature; in others, they exercise only advisory, ombudsman-like powers.²⁶⁶

A potentially significant example of the prosecutorial type is the office of the Special Counsel, created under the 1978 Civil Service Reform legislation to investigate and prosecute before the Merit Systems Protection Board specified categories of alleged misconduct by supervisors in government agencies.²⁶⁷ Another kind of

²⁶⁶ An example of an "ombudsman"-type advocate is the recently established Office of Advocacy within the Small Business Administration. See P. L. 94-305, 90 Stat. 668, 1976. This office does not have power to prosecute or initiate proceedings against individuals, although it has filed *amicus* briefs in selected cases. Most of its activities involve serving as a go-between for small businesses dealing with federal agencies, and making policy recommendations to other agencies which would benefit small business. Telephone conversation with David Voight, Deputy Chief Counsel for Advocacy, Small Bus. Adm., Aug. 4, 1980. Where the office becomes involved in a specific dispute, it is usually at a stage prior to the initiation of a lawsuit, and often its role is to help both parties reach a satisfactory compromise. Thus its function is to supplement not supplant tort litigation, although it may help to reduce the need for litigation.

²⁶⁷ See 5 U.S.C. §§ 1204-08. The types of misbehavior that this office can prosecute are narrowly specified, and include (1) "prohibited personnel practices" (primarily relating to impermissible grounds for taking action against an employee); (2) actions taken against employees who disclose information on official wrongdoing or mismanagement ("whistleblowers"); and (3) unlawful political activity by public employees.

prosecutorial "advocacy" unit, entirely internal to the agency, is employed by the New York City police. Allegations against an officer may be brought either by the Community Complaint Review Board, a branch of the police department that receives complaints of brutality and other wrongdoing, or by the Internal Affairs Division, which independently investigates police corruption. Where prosecution is recommended, it is handled by an Advocate's staff of police attorneys. A trial-type administrative hearing is held and penalties can be assessed ranging from short suspensions to dismissal. Those within the department reportedly view the process as effective—six to seven hundred officers are tried annually. Accountability remains a problem, however, as there is no way for a citizen to require action on a complaint that internal review has found to be unmeritorious. It also appears that this system is used primarily to deal with allegations of brutality and corruption, and not with alleged Fourth Amendment violations or other actions that may be more typical of § 1983 claims.²⁶⁸

A third form of outsider involvement in discipline occurs when a complainant is empowered to pursue his grievance despite its rejection by the body authorized to prosecute violators. The argument is that deterrence will be weakened so long as the agency retains control of the process and can reject meritorious complaints. The complainant's power to pursue the grievance "over the agency's head" may also be linked to a previously filed tort claim in the matter. A proposed amendment to the Federal Tort Claims Act, for example, would establish a procedure for enabling citizens to invoke discipline against employees whose constitutional torts led to government liability under the FTCA.²⁶⁹

²⁶⁸ Interview with Phil Michael, note 87 *supra*.

²⁶⁹ H.R. 2659, 96th Cong. Under this scheme, a request for administrative proceedings against an official could be directed to an agency head by the following persons: (1) the attorney general, where the United States has paid a judgment or settlement in a constitutional tort case (this request is mandatory; all others are permissive); (2) any person who has obtained a judgment against the United States under a constitutional tort claim, within sixty days after the judgment; or (3) any person who has brought an action against the United States on a constitutional tort claim, no sooner than sixty days and no later than 120 days after the claim is brought.

The individual requesting such an inquiry may participate in the disciplinary proceeding. After the inquiry (including a hearing if necessary), the agency head would determine whether disciplinary action is appropriate. The plaintiff may appeal this decision, in most cases to the Merit Systems Protection Board, and then to court. An appeal is not available, however, unless there has been a monetary recovery against the United States in the suit for damages.

Victim-centered disciplinary processes are exceedingly controversial. Indeed, such a remedy has been a basic obstacle to passage of FTCA amendments that would expand governmental liability and eliminate official liability in the case of constitutional torts.²⁷⁰ Law enforcement officials maintain that such a process impugns their integrity, and they apprehend that it could be used for harassment purposes. Groups purporting to represent victims, however, justify this approach by pointing to instances in which the agency failed to discipline employees despite court findings of illegality.²⁷¹

The three types of innovations that I have discussed could, of course, be instituted in protean forms and variations. Perhaps combinations of these types would serve well. For example, victims could be permitted to initiate agency disciplinary proceedings, with appeals permitted only where recommended by an internal or external "advocate." This would limit the advocate to a manageable role and assure agencies that they would not be harassed indefinitely by frivolous claims, while allowing citizens some meaningful role in the disciplinary process. Complaint review boards could perhaps be structured to provide membership or some other role to an internal or external advocate. Victim-centered disciplinary processes could be confined to particular categories of misconduct, such as official behavior that a court has already found to have been malicious.

In focusing upon the strengthening of disciplinary procedures, one may easily neglect other opportunities for influencing official conduct. An official's propensity to adopt a personal risk-minimizing strategy depends not merely upon his perception of the costs—of liability and other adverse consequences—associated with particular behavior. It also depends upon what I have called his "duty constraint," the range of personal risk that he is willing to accept out of feelings of duty and of personal commitment to the agency's mission. Within that range, the official will act without regard to the risk that he may be sued.

²⁷⁰ Interviews with James Lauer, Assistant Counsel, Subcom. on Admin. Law & Governmental Rels., House Judiciary Comm., and Michael Dolan, Deputy Asst. Atty. Gen., Office of Legislative Liaison, U.S. Dept. of Justice, July 17, 1980.

²⁷¹ For example, the American Civil Liberties Union points to instances in which, following findings of extensive illegal FBI activity, only a few agents were in fact disciplined. 1979 House Hearings, note 18 *supra*, at 45. See also Kaplan, note 216 *supra*, at 1050; Project, note 173 *supra*, at 810-13.

The magnitude and intensity of an official's duty constraint are not unalterable facts. Within limits, they can be shaped and influenced by the organization of which he is a part. Some organizations such as the FBI and the Marine Corps are better than others at creating an *esprit de corps*, a sense of overriding mission, an atmosphere in which bravery or selflessness are rewarded. Because of the unusual tensions that surround the work of their low-level employees, street-level organizations will find it especially difficult to expand their officials' duty constraints—but, if successful, especially rewarding. Improved recruitment and training are important but insufficient. Conveying a sense of organizational support and loyalty are probably even more significant. Whether the agency can foster these values while fashioning more effective disciplinary controls, especially if those controls are subject to the influence of "outsiders," is a difficult question. What seems clear, however, is that additional efforts along these lines could yield high dividends.

Recent developments provide some basis for cautious optimism that agencies can muster the will and the ability to discharge that responsibility. First, expanded official and governmental liability will significantly increase the fiscal, political, and programmatic incentives of agencies to exercise closer control over street-level official behavior. While the ability of agency management to exercise that control effectively will remain limited, and certain political and organizational incentives will continue to encourage agencies to tolerate some degree of official misconduct, the pressures inclining agencies toward tighter supervision will certainly be stronger than in the past. Second, public attitudes toward official misconduct seem to have hardened considerably in recent years. The political incentives for an agency to maintain a vigorous disciplinary system may be greater than before. Third, budgetary pressures and the consequent necessity for freezes or cutbacks in government employment at all levels may weaken the bargaining position of those groups and interests that often resist effective disciplinary processes. Finally, a number of institutional innovations, such as the Office of Special Counsel and the individualized performance appraisal system established under the Civil Service Reform Act, may begin to influence agency and individual attitudes toward official misconduct.²⁷²

²⁷² See *Civil Service Reform Act Bringing a Rise in Dismissals*, N.Y. TIMES, Nov. 12, 1980, p. A-1.

CONCLUSION

The relation between right and remedy is problematic. To create a particular remedy is to generate change in social behavior that will often impair the specific right that the remedy is designed to vindicate, perhaps even causing new injustices requiring additional remedies. A right finds its provenance in constitutional, statutory, or common-law values, and is justified insofar as it reifies those values. In contrast, a remedy is—or ought to be—more strategic, more instrumental, more empirical in nature. To assert that a right is important or even fundamental tells nothing about how it can best be secured. One cannot intelligently address that question without understanding the behavioral contexts in which those individuals whose decisions the remedy seeks to influence actually function. I have maintained that, in the milieu in which street-level officials make decisions, the remedy of official damage liability may be so powerful and salient that it cannot vindicate the right effectively without endangering other important social interests. In remedial justice as in other areas of human striving, more may be less and less more. The courts and Congress, by steadily expanding official liability for damages while continuing to countenance large preserves of governmental immunity, have neglected that pervasive paradox.

Senator GRASSLEY. It is next my honor to call to the table the Honorable Elliot Richardson, and I am very pleased that he could join us today, I am particularly pleased, Elliot, that you would present your testimony from the vantage point of a former Federal official who has been sued in an individual capacity, and then as well you have been a lawyer who recently argued a *Bivens* type case before the U.S. Supreme Court.

Your testimony concentrates on high level officials and the burdens that these suits have on the administration of Government. As a former U.S. attorney, former U.S. Secretary of HEW, Secretary of Defense, and Attorney General of the United States, you certainly have experience to testify as to the effects of damage actions against Federal officials.

I am glad you also have with you one of your colleagues, Mr. Glenn Gerstell, of the law firm here in town.

Elliot, thank you very much.

Would you proceed?

STATEMENT OF ELLIOT RICHARDSON, ATTORNEY, MILBANK, TWEED, HADLEY & McCLOY, WASHINGTON, D.C., ACCOMPANIED BY GLENN GERSTELL

Mr. RICHARDSON. Thank you, Mr. Chairman.

I appreciate very much this opportunity to testify in support of your very important bill, S. 1775.

You have most appropriately identified my qualifications and background for offering this testimony, and I appreciate your previous announcement that you would, in any case, include in the record the full text of my prepared testimony.

I would like, therefore, Mr. Chairman, to deal briefly with some of the problems and considerations that have to be addressed in dealing with the issue of immunity and compensation of individuals for constitutional torts and then touch on some aspects of the proposed legislation itself.

The background against which we address these questions, of course, arises out of the circumstance that the Supreme Court of the United States in effect created a new type of action which, in turn, has resulted in large volumes of litigation and what Mr. Justice Rehnquist has called "the illogic and impracticability of distinguishing between constitutional and common law claims for purposes of immunity," and because the District courts have been reluctant to grant summary judgment in cases involving senior executive branch officials, there is, I believe, reason for concern that unless this trend is checked, many of the individuals or groups who may be aggrieved by decisions in which a senior official may have had some role, will be encouraged to file suits against those individuals.

Literally thousands of lawsuits, many of them frivolous, have been brought against Federal officials charging them with having taken unconstitutional actions that caused the plaintiff harm. Many examples of those lawsuits have been described by other witnesses who have testified before this subcommittee. The burdens that those lawsuits have had on the Federal employees involved,

and the debilitating impact on the administration of Government that has resulted, I think are clear.

Although in a unique position to alleviate that debilitating impact, Congress must, of course, weigh competing policy considerations. One consideration is, obviously, the need to compensate citizens who suffer as a result of the wrongful acts of Federal officials; a second is the need to deter future violations of the freedoms that the Constitution secures; and the third consideration is the need to eliminate the ruinous effect that the fear of personal liability would have on the vigorous discharge of public duties.

These three concerns are, of course, to a significant degree, conflicting ones. A perfect resolution of them is simply not possible. Until the *Bivens* and *Butz* decisions, the interest in the vigorous and effective functioning of Government had been thought so compelling as to outweigh the possibility that some aggrieved citizens could be left remediless.

Obviously, there is no doubt that compensating an individual who has been the victim of a constitutional violation is an important public policy goal. We all agree that it should somehow be attained. However, satisfaction of the public policy goal of compensation need not require that the Government employee who took the unconstitutional action be the one to pay for it. The goal is also fully satisfied if the employer, the Federal Government, compensates the victim. Meeting the victim's need for compensation therefore requires only that either the Federal Government or the Government's employee be held liable for any damages caused by the constitutional tort.

While the public's interest in deterring future constitutional transgressions is undoubtedly great, that interest can be protected and advanced by means other than the imposition of personal liability upon Federal officials.

The honesty and professionalism of most of the Federal employees that I have encountered during the course of my public service leads me to believe that most actions that are found to be constitutional violations result from honest mistakes, rather than from feelings of malevolence by a Government employee toward the victim, or from a lack of respect for the dictates of the Constitution.

Moreover, we should not ignore the fact that imposing liability on the Federal Government for the constitutional wrongs of its employees would itself have a strong deterrent effect. The threat of liability would, for at least two reasons, provide the Government with an incentive to insure that its internal controls against unconstitutional behavior operate satisfactorily. One purely economic reason would, of course, be an agency's desire to minimize the amount paid out in damages suits. The second, more powerful, reason would be an agency's recognition that the pressure of public opinion would be all the more severe in the case of a judgment against or settlement by the agency itself. The latter, which in essence, would incriminate the agency's management, could not be explained away as easily as an isolated judgment against a peccant employee.

Turning now from general or conceptual comments to more technical matters, there are three items I wish to comment on. First, I

believe that the retention by the Government of the good-faith defense available to the employee is entirely appropriate, and in this respect I would have to differ respectfully with Professor Schuck. On the face of it, there is no reason the Government should be any more liable than its employee would be and it could follow therefore that the Government ought to be able to avail itself of all defenses possessed by the employee. To be sure, this means that some citizens who have been injured by the good faith, reasonable actions of Federal officials will be left without a remedy. But in that case, Mr. Chairman, I question whether a "wrong" can be said to have occurred in such a case, which would justify any compensation. In the area of ordinary torts, for example, there is certainly no expectation of entitlement to recovery where one has been injured by nonnegligent action such as an unavoidable accident. To eliminate the good-faith defense for the Government would be to impose strict liability, and I see little justification for the Government to become an insurer of its employees' actions vis-a-vis the public.

I am concerned that the retention of the good-faith defense will cause Federal officials to continue to be enmeshed in years of pre-trial depositions and document discovery aimed at determining the state of mind of an official. The possibility of summary judgment on affidavits and a speedy resolution of constitutional tort suits against the Government would remain highly unlikely were state of mind to continue to be at issue. Thus, retention of this subjective defense will not permit at least one goal to be achieved—the goal of eliminating the need for Federal officials to be distracted from their official duties by their involvement in the defense of a tort suit.

As an alternative, I would therefore suggest that the Government retain only an objectively determined defense, namely, that the Federal official acted with a reasonable belief in the legality of his actions. I recognize that this would entail a shift from *Butz* and cases following it, and at least on its face would constrict the Government's potential liability. Perhaps this change would be advisable so as to expedite resolution of constitutional tort cases—an effect beneficial for both the Government as well as the tort victims.

A second area of concern is the certification procedure by the Attorney General that is contemplated in section 5 of the bill. This procedure, in which the Attorney General would certify that a Federal employee was acting within the scope of his office or employment, is patterned after the certification procedure now existing in the Federal Tort Claims Act. I trust that this scope of employment test will be as broad as the test enunciated by the Supreme Court in its immunity decisions.

Finally, I welcome the provision in section 10 of S. 1775 that makes the bill retroactive, covering all lawsuits pending as of the date the bill is passed. This will eliminate the unfairness to former officials who might otherwise still be held personally liable while present officials cannot be.

Thank you, Mr. Chairman.

That concludes my distillation of my prepared statement, and I would be happy to answer any questions you may have.

Senator GRASSLEY. Did your colleague have anything that he wanted to present?

Mr. GERSTELL. No, thank you, Mr. Chairman.

Senator GRASSLEY. First of all, I know how busy you are, Elliot, and I appreciate your coming up here.

Could you tell us, maybe, what you consider the status of your case before the Supreme Court?

Mr. RICHARDSON. Well, it is pending, Mr. Chairman.

It is a case that presents very clearly the issues affecting the responsibilities of officials who are charged with making decisions under great pressure, often having to address a very large volume of problems in a given day or week.

My role in the pending case, *Nixon, Harlow & Butterfield v. Fitzgerald*, brought by a former Air Force Department employee, Ernest Fitzgerald, has been to represent two former senior White House officials, Bryce Harlow and Alexander Butterfield. Harlow was counselor to the President, Cabinet rank, who dealt with all matters affecting congressional relations and legislation, and a great many other policy issues as well, and whatever contact he had in the circumstances arising from that case was at most fleeting, and arguably did not, in fact, influence the course of events, and yet he has been the object of prolonged litigation. Passing the issues now pending before the Supreme Court itself, I think that the circumstances at least dramatize the public policy issues that are before your subcommittee, Mr. Chairman, and which I touched on in my statement.

Senator GRASSLEY. From your testimony I gather that you do not believe that by retaining the good-faith defense we are simply protecting the Treasury in situations in which compensation is legally, morally, justified?

Mr. RICHARDSON. I do not think so, Mr. Chairman, for the reasons I stated. It does not seem to me that the United States, which is, after all, all of us, and the funds we are talking about are funds derived from all of us as taxpayers, should be liable on the basis of some different standard than has heretofore been applicable to suits against government employees.

And, so, I therefore support your bill, Mr. Chairman, insofar as it provides that the Government may take advantage of any defenses heretofore available to the employee.

Senator GRASSLEY. Do you have any thoughts about attorneys' fees for successful litigants?

Mr. RICHARDSON. Yes, I have given that some thought, Mr. Chairman.

I do not feel strongly about it one way or the other. I do not have an impression that the absence from the Federal Tort Claims Act of provision for the award of attorneys' fees has made that Act significantly less effective than it would be if it did so provide.

But, on the other hand, I am not aware of any strong consideration that would lead me to oppose their inclusion.

Senator GRASSLEY. Lastly, as you know, the Federal Tort Claims Act has been interpreted to provide a remedy only against acts or omissions that are tortious under State law in the jurisdiction where they occurred.

So, I would like to ask if you would be in favor of distinguishing the Federal law torts into their remedial structure in the Federal Tort Claims structure?

Mr. RICHARDSON. No, I would not. But, I think it would be appropriate to include all State law torts. I take it that one of the provisions of your bill would eliminate the present exclusion from the Federal Tort Claims Act of various torts, still excluding such things as libel and slander, but any direct tort committed by act of an individual other than these would be included, and I think that is a sound provision.

Senator GRASSLEY. I have no further questions.

I do want to say that we would like to continue to stay in touch with you. Particularly, I am interested in your point of view, you have already expressed it, where you feel this legislation does not go far enough, because obviously, we have some people who feel it goes too far.

Thank you very much.

Mr. RICHARDSON. Thank you very much.

I appreciate this opportunity to appear before you.

[The prepared statement of Mr. Richardson follows:]

PREPARED STATEMENT OF ELLIOT L. RICHARDSON

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to comment on S. 1775, a bill to amend title 28 of the United States Code to make the United States the exclusive defendant in essentially all common law tort cases and in all so-called "constitutional tort" cases arising out of actions by federal employees acting within the scope of their employment.

My statement today is in favor of the bill, but I will not attempt to replicate the remarks of the witnesses before the Subcommittee at prior hearings who have also argued in support of the legislation. Rather, I wish to draw upon my experience as a former federal official, as a defendant in numerous suits (including some seeking money damages) arising out of my official duties, and as a current member of the private bar who has recently argued a case* now awaiting decision by the Supreme Court involving an issue central to this bill -- whether high level federal officials should be personally liable for constitutional torts. I will discuss briefly the present state of law in this area, then comment on what I perceive to be the public policy rationales supporting this legislation and finally make some observations about some technical aspects of the bill. My remarks will touch upon the problem of the high level federal official -- a problem that was not focused upon by the representatives of the various agencies who have testified in favor of the bill -- and on those provisions of the bill relating to constitutional, rather than common law, torts.

The Law of Official Immunity

As I understand it, S. 1775 is a direct descendant of bills that have been introduced in response to the Supreme Court's decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny, which hold federal employees to be personally liable for deprivation of a citizen's constitutional rights. The repercussions of Bivens, which have been extensive and are still continuing, arise from the fact that the Bivens holding ran counter to a long-established rule of official immunity. Partly as a corollary to the principle of sovereign immunity, it had been acknowledged since at least 1896 (in the case of Spalding v. Vilas, 161 U.S. 483) that federal executive officials were absolutely immune from personal damages actions arising from the performance of their official duties. This was obviously consonant with the principle of absolute judicial immunity, which this country had adopted from the English common law system.

* Harlow & Butterfield v. Fitzgerald, No. 80-945

Thus, victims of wrongs perpetrated by federal executive officials could not receive any compensation until 1946, when the Federal Tort Claims Act abrogated sovereign immunity to permit victims of negligence to recover from the government itself. In any event, no recovery was permitted from the federal executive official himself, who remained immune from all tort actions then recognized.

It was against this backdrop of limited governmental and no individual liability that the Supreme Court decided the Bivens case nine years ago. As this Subcommittee knows, the Court chose to create a new type of claim founded directly upon the Constitution rather than leave Mr. Bivens and others similarly situated without a remedy. It specifically reserved, however, the question of how this new cause of action was to be reconciled with the broad immunity apparently available to federal executive officials under the Spalding v. Vilas line of cases, particularly including Barr v. Matteo, 360 U.S. 564 (1959). However, it was faced with this very question seven years later in Butz v. Economou, 438 U.S. 478 (1977), when the Secretary of Agriculture was alleged to have participated in a violation of the Fifth Amendment. Recognizing that state officials were only qualifiedly immune under 42 U.S.C. §1983 for constitutional torts, the Court rationalized that it would be anomalous were federal executive officials to be accorded greater immunity for the same type of tort. Accordingly, the Court restricted the absolute immunity rule to common law torts, and held that henceforth federal executive officials (even Cabinet officers) who committed a constitutional tort would be entitled to only a qualified immunity -- i.e., immunity if it could be shown that their actions were taken in good faith and in a reasonable belief in the legality of such actions. The Butz ruling left intact the absolute immunity available to Senators and Representatives under the Speech and Debate Clause of the Constitution, and to federal and state judges and prosecutors under the historic doctrine of judicial immunity.

Thus, for federal executive officials, we are left with what Justice Rehnquist has called "the illogic and impracticability of distinguishing between constitutional and common-law claims for purposes of immunity." Butz, supra, 438 U.S. at 520 (dissenting opinion). Moreover, with regard to liability for constitutional torts, we have the anomalous situation in which the Attorney General of the United States is entitled to only qualified, good faith immunity, while an Assistant U.S. Attorney is absolutely immune. I am not suggesting, of course, that federal executive officials should be entitled to absolute immunity merely because of their rank; as the Supreme Court has earlier told us, immunity from civil damages is "not a badge or emolument of exalted office." Barr, supra, 360 U.S. at 572.

As I will discuss in a moment, immunity should be granted only to those officials, in the words of the Supreme Court, whose "special functions" place them in "exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." Butz, supra, at 507-08. It has always been understood that

immunity was an essential element of the effective functioning of government. The classic rationale for immunity was eloquently stated by Justice Learned Hand:

The justification for ... [granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. [*Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).]

My own experience as a former Cabinet officer leads me to conclude that one group of officials who perform "special functions" requiring the protection of immunity are the high level agency officials and senior presidential advisers who every day deal with matters of critical importance to the Nation. As key decision-makers, these high level executive officials are confronted daily with numerous matters of intense exigency and political significance. In exercising their broad range of discretion to resolve these matters, such officials can exert a significant impact -- for better or worse -- upon the lives of countless citizens. It is not surprising that these circumstances would provoke vindictive law suits by citizens claiming to be aggrieved by a decision that they attribute to some malevolent official motive. The Supreme Court, in acknowledging the unique circumstances of high level executive officials in the context of an immunity suit, has observed:

In the case of higher officers of the executive branch ... the inquiry is far more complex since the range of decisions and choices -- whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions -- is virtually infinite ... [O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile of constitute virtual abdication of office. [*Scheuer v. Rhodes*, 416 U.S. 232, 246 (1974).]

Yet in spite of the acknowledged special situation of these senior executive officials, the Supreme Court has chosen to protect them with only a qualified, good faith immunity.

Although this qualified immunity doctrine might appear to be an attractive method of protecting official decision-making while at the same time allowing vindication of constitutional rights, as a practical matter it has provided almost no protection at all. Because the qualified immunity doctrine depends so critically on proving the good faith of the government employee who is charged with unconstitutional conduct, it is very easy for the plaintiff -- quoting again from the minority opinion in *Butz* -- to "paint

his grievance in constitutional colors," to allege malice, and to use these two allegations together to get past the defendant's motion for summary judgment. Experience in the federal district courts over the past few years has demonstrated that by raising an issue as to the defendant's state of mind, the plaintiff can virtually always force a full trial before a jury on the merits of his claim. No matter how weak the plaintiff's case may be, the defendant is almost inevitably subjected to the burden of lengthy litigation and to the risks inherent in the outcome of a jury verdict. This was expressly foreseen by the minority in Butz:

[I]f we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the "interests of the people," ... which "require[s] that due protection be accorded to [Cabinet officials] in respect of their official acts." [Butz, *supra*, 438 U.S. at 522, quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896) (brackets in original).]

These problems are especially pronounced in cases involving a matter that senior executive officials might have had some involvement with. Such cases will typically entail not merely a disruption in the lives of current and former public officials but also an extensive judicial intrusion as Federal District Judge Gerhard Gesell has described:

[It is a] fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discovery [sic] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. ... [M]any of these cases are political in character, involve highly controversial acts,

and will necessarily embroil juries in passing upon the intricacies of executive decisionmaking.
[Halperin v. Kissinger, 606 F.2d, 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring).]

Indeed, the kind of recurring judicial scrutiny of the executive branch that would be necessary in suits involving high executive officials might well violate (at least in spirit) the constitutional doctrine of separation of powers. In any event, a defendant federal employee would be faced with the need to explain and justify to a lay jury years later his often complicated and controversial decisions. The difficulties and unfairness of this type of retrospective assessment are obvious.

Because the district courts have been reluctant to grant summary judgment in cases involving senior executive branch officials, I am concerned that unless this trend is checked, many of the individuals or groups who may be aggrieved by decisions in which a senior official may have had some fleeting role will be encouraged to file suits against those officials. Indeed, that is precisely what has occurred in the course of the last ten years. Literally thousands of lawsuits, many of them frivolous, have been brought against federal officials charging them with having taken unconstitutional actions that caused the plaintiff harm. Many examples of those lawsuits have been described by other witnesses who have testified before this Subcommittee. The burdens that those lawsuits have had on the federal employees involved, and the debilitating impact on the administration of government that has resulted, I think are clear.

Public Policy Considerations

Although in a unique position to alleviate that debilitating impact, Congress must of course weigh competing policy considerations. One consideration is obviously the need to compensate citizens who suffer as a result of the wrongful acts of federal officials; a second is the need to deter future violations of the freedoms that the Constitution secures; and the third consideration, which I have just mentioned, is the need to eliminate the ruinous effect that the fear of personal liability would have on the vigorous discharge of public duties.

These three concerns are conflicting ones. A perfect resolution of them is simply not possible. Until the Bivens and Butz decisions, the interest in the vigorous and effective functioning of government had been thought so compelling as to outweigh the possibility that some aggrieved citizens could be left remediless.

Obviously, there is no doubt that compensating an individual who has been the victim of a constitutional violation is an important public policy goal. We all agree that it should somehow be attained. However, satisfaction of the public policy goal of compensation need not require that the government employee who took the unconstitutional action be the one to pay for it. The goal is also fully

satisfied if the employer, the federal government, compensates the victim. Meeting the victim's need for compensation therefore requires only that either the federal government or the government's employee be held liable for any damages caused by the constitutional tort. (In fact, the compensation goal undoubtedly is better served by holding the government liable, rather than the employees. Many government employees will be judgment proof, but the government itself, I trust, will not be.)

Having found a means to satisfy the compensation goal, we must then deal with the twin effects on the federal employee of (again in Learned Hand's words) the "constant dread of retaliation." The fear of liability could arguably deter an employee from unconstitutional conduct, but it could also hamper the vigorous discharge of public duties. The public's interest in deterring future constitutional transgressions might be promoted most directly by requiring the government employee personally to pay for the harm that his actions have caused. However, to the extent that the fear of liability would cause the employee to be more timid in performing his duties, deterring constitutional violations by holding the employee personally liable would at the same time work against the public's interest in the effective functioning of government. This last interest is best served by making the government be liable, rather than the government's employees. Thus, assuming we all agree that we do want to compensate the victims of constitutional torts, choosing the the wisest and most efficacious rule of liability involves reconciling the interest in deterring constitutional violations by holding government employees personally liable, with the need to protect the employees in the "unflinching discharge" of their duties by holding the federal government liable instead.

It seems to me that, while the public's interest in deterring constitutional violations is great, that interest can be protected and advanced by means other than the imposition of personal liability upon federal officials. The honesty and professionalism of most of the federal employees that I encountered during the course of my public service leads me to believe that most actions that are found to be constitutional violations result from honest mistakes, rather than from feelings of malevolence by a government employee toward the victim, or from a lack of respect for the dictates of the Constitution. This last point is particularly true in view of the always rapidly changing and occasionally uncertain state of many areas of constitutional law, a circumstance that makes it difficult for even the most able and conscientious government employee to predict with confidence whether or not his actions will ultimately be upheld by the courts. The integrity of the vast majority of federal employees is, I submit, the more important and potent deterrent to unconstitutional behavior, not the threat of liability.

Moreover, we should not ignore the fact that imposing liability on the federal government for the constitutional wrongs of its employees would itself have a strong deterrent effect. The threat of liability would, for at least two reasons, provide the government with an incentive to ensure that its internal controls against

unconstitutional behavior operate satisfactorily. One, purely economic, reason would of course be an agency's desire to minimize the amount paid out in damages suits. The second, more powerful reason would be an agency's recognition that the pressure of public opinion would be all the more severe in the case of a judgment against (or settlement by) the agency itself. The latter, which in essence would incriminate the agency's management, could not be explained away as easily as an isolated judgment against a peccant employee.

In any event, imposing liability on the government as employer is fully consistent with the private sector doctrine of respondeat superior, a basic assumption of which is that the employer's liability for the employee's acts will have a sufficient deterrent impact. The doctrine of respondeat superior of course is a doctrine of tort law recognized in the Federal Tort Claims Act and in every jurisdiction in the United States. S. 1775 merely extends that doctrine to encompass the constitutional torts of federal employees, treating those torts in the same way that courts across the country treat other kinds of torts on a daily basis. In this connection, I note that the bill (§5) expressly contemplates that appropriate disciplinary proceedings could be initiated against an employee whose actions gave rise to a constitutional tort suit. Moreover, the continuing availability of criminal sanctions against the employee would also further the deterrence goal. Finally, I note that one of the explicit reasons the Supreme Court in Butz denied absolute immunity to federal executive officials in the cases of constitutional torts was that state officials did not enjoy such immunity (under 42 U.S.C. §1983) in the same types of cases. This rationale ignores the fact that the federal government can control its own employees and that relieving the employees' fear of liability would not spawn a regime of lawless conduct.

Even if we ascribe some useful deterrence value to imposing personal liability on federal officials, the impact the fear of liability has on the vigorous and "unflinching discharge" of the employee's duties is unquantifiable but undoubtedly significant. As Justice Rehnquist said in Butz, "[i]t simply defies logic and common experience to suggest that officials will not have [the fear of litigation] in the back of their minds when considering what official course to pursue." 438 U.S. at 526-27. Clearly, effective public governance demands that government employees discharge their duties with both eyes on what the public interest demands, rather than with one eye on the consequences their decisions and actions might have on their own personal finances.

Imposing liability for constitutional torts on government employees might also disrupt the effective functioning of government by diverting the attention of employees who have been sued, and who will have to take time away from their duties to defend themselves. In addition, the fear of liability will frighten many potential government employees away from public service altogether, making it more difficult for the federal government to attract the most capable persons to perform its tasks.

Thus, from the standpoint of sound public policy,

it seems clear to me that it is the federal government, rather than the government's employees, that should be liable for constitutional torts. Placing sole liability on the government will compensate the victims of constitutional wrongs, and yet still permit adequate deterrence of these wrongs through the means I previously mentioned. Most importantly, placing sole liability on the government will enable the government's employees to discharge their public duties free from the distorting effect of the fear of litigation and financial ruin.

Adoption of S. 1775 need not be viewed as a contradiction of the Supreme Court's reasoning in the Bivens and Butz cases. Because it is Congress and not the Supreme Court that can abrogate sovereign immunity -- by enacting a consent such as S. 1775 for the government to be sued -- the Court could not impose liability on the government for constitutional deprivation by its officers. Instead, the Court was forced to choose between two alternatives: compensating the victims of constitutional wrongs while at the same time potentially discouraging government employees from discharging their duties vigorously, by holding the employee personally liable for his unconstitutional actions, or leaving the victim of a constitutional violation remediless in order to encourage the effective functioning of government, by holding the government employee immune from liability. The Court has chosen the latter alternative, but has prudently attempted to balance the effect of this by limiting the employee's liability to those situations in which the good faith and reasonableness tests could not be met.

Unfortunately, as I have said, this approach has led to difficulties that were not fully anticipated by the Court in Butz. To the extent that the difficulties were foreseen by the Court, its opinion makes clear that their remedy should await Congressional action. Because the Court cannot legislate and because it must rule only in the specific case that it finds before it, the Court's immunity and liability scheme has been limited to one that I suggest is less than ideal.

Only Congress can create an integrated scheme that properly balances the conflicting interests I have already mentioned. Unlike the Supreme Court, Congress can waive the defense of sovereign immunity to permit the government to be sued for damages resulting from the violation of constitutional rights, while at the same time barring damage actions from being brought against the government employee who is charged with unconstitutional conduct. Congress can do so simply by passing S. 1775. I strongly support S. 1775 because I believe it goes a very long way toward best implementing the policies and concerns evidenced by the Supreme Court in cases such as Bivens and Butz.

Technical Provisions of the Bill

Finally, if I may turn from conceptual to more technical matters, there are three items I wish to comment on. First, I believe that the retention by the government

of the good faith defense available to the employee is entirely appropriate. On the face of it, there is no reason the government should be any more liable than its employee, and it should thus be able to avail itself of all defenses possessed by the employee. Of course, this means that some citizens who have been injured by the good faith, reasonable actions of federal officials will be left without a remedy. However, I question whether a "wrong" can be said to have occurred in such a case, which would justify any compensation. In the area of ordinary torts, there is certainly no expectation of entitlement to recovery where one has been injured by non-negligent action such as an unavoidable accident. To eliminate the good faith defense for the government would be to impose strict liability, and I see little justification for the government to become an insurer of its employees' actions vis-a-vis the public.

I am concerned, however, that the retention of the good faith defense will cause federal officials to continue to be enmeshed in years of pretrial depositions and document discovery aimed at determining the state of mind of an official. The possibility of summary judgment on affidavits and a speedy resolution of constitutional tort suits against the government would remain highly unlikely were state of mind to continue to be at issue. Thus, retention of this subjective defense will not permit at least one goal to be achieved -- the goal of eliminating the need for federal officials to be distracted from their official duties by their involvement in the defense of a tort suit.

As an alternative, I would therefore suggest that the government retain only an objectively determined defense, namely, that the federal official acted with a reasonable belief in the legality of his actions. I recognize that this would entail a shift from *Butz* and cases following it, and at least on its face would constrict the government's potential liability. Perhaps this change would be advisable so as to expedite resolution of constitutional tort cases -- an effect beneficial for both the government as well as the tort victims. I realize that for the government merely to have to prove reasonableness in order to exculpate itself would leave remediless the victims of constitutional torts caused by the reasonable but malicious acts of federal officers. I suspect the class of such victims is small and the change would, as I have said, probably have a net beneficial effect. In any event, I simply point out that, under the doctrine of absolute judicial immunity, we are willing to pay the price that some injuries at the hands of malevolent judges and prosecutors will go unredressed.

A second area of concern is the certification procedure by the Attorney General that is contemplated in §5 of the bill. This procedure, in which the Attorney General would certify that a federal employee was acting within the scope of his office or employment, is patterned after the certification procedure now existing in the Federal Tort Claims Act (28 U.S.C. §2679(d)). I trust that this scope of employment test will be as broad as the test enunciated by the Supreme Court in its immunity decisions. In essence, the Court has said that official immunity will be available unless the officer acted outside of the "outer perimeter of

[his] line of duty" (*Barr v. Matteo*, *supra*, 360 U.S. at 575) or was "manifestly and palpably beyond his authority" (*Spalding v. Vilas*, *supra*, 161 U.S. at 483).

Finally, I welcome the provision (§10) of S. 1775 that makes the bill retroactive, covering all lawsuits pending as of the date the bill is passed. This will eliminate the unfairness to former officials who might otherwise still be held personally liable while present officials cannot be.

Thank you, Mr. Chairman. I would be happy to answer any questions which the Subcommittee may have.

Senator GRASSLEY. Our next witness is Donald J. Devine, Director of the Office of Personnel Management. Our next witness has been the Director for about a year.

Before this he was professor of political science at the University of Maryland.

We welcome you today for your testimony. If you would like to introduce the person you have with you, I would appreciate it.

STATEMENT OF DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ACCOMPANIED BY JOSEPH MORRIS, GENERAL COUNSEL

Mr. DEVINE. Thank you.

This is Joseph Morris, our General Counsel at the Office of Personnel Management.

It is my pleasure to come before your committee and to support your bill, S. 1775, being very much in the interest of Federal employees whose welfare I am to sustain.

I would like to summarize the statement that I issued to the committee.

Senator GRASSLEY. We will print your entire statement in the record and I appreciate your summarizing it.

Mr. DEVINE. Thank you.

We are at a turning point in our national life, when the Congress and the people agree with the President that immediate budgetary retrenchments are necessary and that Federal expenditures must be at reduced levels in the future. At no previous time has there been a more transparent need for an energetic Federal bureaucracy to conduct the business of government so as to provide maximum services to the taxpayer for the dollars available. Yet, the specter of lawsuits against agents of the Government in their personal capacities, for alleged violations of constitutional rights, threatens the vitality of the Government.

The economic realities that we now see should be an irresistible incentive for Federal superiors to make their operations more efficient. The bare possibility of thereby subjecting themselves to personal liability, however, and to the anxieties and inconveniences attendant to prolonged litigation, is an automatic disincentive for superiors to make their organizations more productive.

The Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Agents* was the progenitor of the judicial theory that has

developed in recent years into a wholesale exposure of Federal officials to personal ruin based upon actions taken in the performance of their duties. Nowhere is it ordained, however, that the present system is the exclusive or even the preferred method of deterring constitutional violations and punishing Federal employees who commit such abuses. Indeed, the Supreme Court majority opinion in *Bivens* recognized the desirability of a direct remedy against the Government as a substitute for individual liability of the agent but explained that "the sovereign remains immune to suit."

Eleven years after *Bivens*, the sovereign is still immune to suit for infringements of its citizens' constitutional rights. Thus, Federal agents are charged with a responsibility for making sophisticated constitutional judgments, in the heat of action, about questions which divide lawyers and judges even after they have had the benefit of scholarly arguments and leisurely deliberations. These agents of the Government are without the protection of the doctrine of respondeat superior, which their counterparts in the private sector enjoy with respect to torts committed within the scope of their employment.

S. 1775 is the latest in a series of legislative proposals made during the last three Congresses to waive the Government's immunity, to grant immunity to Federal officials acting within the scope of their employment, and to open the national fisc to make whole the victims of constitutional torts. As S. 1775 comes under consideration, it is well to recognize that its enactment is just as crucial to budgetary reform as other measures that are designed expressly to lead to economic solvency. It is also well to give thoughtful scrutiny to the efficiency of the judicial scheme of individual liability now in existence and to the identifiable benefits and costs of that scheme.

Bivens suits are intended to yield two benefits: deterrence of official misconduct or, alternatively, punishment of misconduct; and restitution to victims of constitutional torts.

It must be conceded, however, that the *Bivens* system does serve as a deterrent. The shortcoming of this approach to deterrence is that some Federal officials will refrain from taking any difficult or controversial actions at all. It is also conceded that this system punishes misconduct. Unfortunately, the system punishes the hapless Federal employees who are the objects of spurious complaints as well as the wrongdoers.

The second benefit expected from the *Bivens* system is the compensation and restitution of individuals injured by constitutional misdeeds. Yet, in the event of an egregious violation of an individual's rights, resulting in a properly and justly large award in damages, the successful plaintiff is unlikely to be able to obtain his fair compensation. The Federal employee-defendant commonly is not a person of great wealth and typically would not have the financial resources to satisfy a large judgment. No matter how large and just a jury award might be, there is no fair compensation if the damages cannot be paid. Again, this benefit also is not absolute.

Given the size of the problem, and the unfavorable consequences that accompany the benefits, the costs of the *Bivens* system outweigh its efficacy. There are three categories of costs: (1) the human costs to the Federal agents named as individual defendants;

(2) the costs to the efficiency of the civil service; and (3) the tangible monetary costs.

Senator GRASSLEY. Mr. Devine, I have to go over—I have to help get a quorum in Judiciary. So, we will have to suspend.

I had announced this before you came.

[A recess was taken at 10:55, and convened again at 12:10 p.m.]

Senator GRASSLEY. Thank you for your patience.

Mr. MORRIS. I am sorry that Mr. Devine had other obligations today and had to leave to attend to them. He regrets that deeply and is sorry that he will not be able to complete his testimony. He has asked me if I would ask you to incorporate, as you have already said you would do, his testimony in the record.

The gist of the testimony that Director Devine is submitting tries to identify some of the costs to the Government, particularly in personnel terms, that the present system has.

The testimony tries to identify how Senate bill 1775 addresses those concerns; we think rather effectively. It also essays to respond to some detractors of the bill, who have suggested that it leaves inadequate protections for citizens who may be victimized by constitutional torts, by examining briefly some of the mechanisms for discipline of personnel in the administrative branch which presently exist. These can and ought to be more emphatically employed by Federal management, part and parcel with the remedies that Senate bill 1775 will provide.

That is, hand-in-glove, to provide a complete means by which this can be addressed.

So, we are submitting this for the record and will be happy to answer questions.

Perhaps, given the absence of Director Devine, the best way to treat those questions would be to have them submitted in writing after you have had an opportunity to hear all the testimony. We would be happy to respond in writing, if that is what you prefer.

Senator GRASSLEY. We will submit all of our questions in writing to you.

I want to thank you again. Will you give my personal apologies to Mr. Devine that the meeting came up unexpectedly late last night?

It was rescheduled for this hour and it was necessary to have a quorum there.

Thank you very much.

Mr. MORRIS. Senator, we understand fully, and Director Devine hopes you accept his apologies. We certainly want to cooperate to the fullest extent.

Senator GRASSLEY. Let me assure you that your people have been very cooperative, including yourself.

[The prepared statement of Mr. Devine follows:]

PREPARED STATEMENT OF DONALD J. DEVINE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

We are at a turning point in our national life, when the Congress and the people agree with the President that immediate budgetary retrenchments are necessary and that Federal expenditures must be at permanently reduced levels in the future. At no previous time has there been a more transparent need for an energetic Federal bureaucracy to conduct the business of Government so as to provide maximum services to the taxpayer for the dollars available. Yet the specter of lawsuits against agents of the Government in their personal capacities, for alleged violations of Constitutional rights, threatens the vitality of the Government.

The economic realities that we now see should be an irresistible incentive for Federal superiors to make their operations more efficient. The bare possibility of thereby subjecting themselves to personal liability, however, and to the anxieties and inconveniences attendant to prolonged litigation, is an automatic disincentive for superiors to make their organizations more productive.

The budgetary constraints under which Federal managers must operate now and in coming years should foster initiative and flexibility in attempts to maintain and even improve delivery of essential Government services. It is predictable, though, that innovative and streamlined delivery procedures may antagonize the intended recipients of the services. Even the more conscientious and dedicated managers will be deterred by the potential for lawsuits challenging their program decisions on Constitutional grounds. The more apprehensive employees may turn to increasingly elaborate, expensive, and inefficient procedures to protect themselves from the risk of personal liability.

The Supreme Court's 1971 decision in Bivens v. Six Unknown Named Agents¹ was the progenitor of the judicial theory that has developed in recent years into a wholesale exposure of Federal officials to personal

¹ 403 U.S. 388 (1971).

ruin based upon actions taken in the performance of their duties. Nowhere is it ordained, however, that the present system is the exclusive or even the preferred method of deterring Constitutional violations and punishing Federal employees who commit such abuses. Indeed, the Supreme Court's majority opinion in Bivens recognized the desirability of a direct remedy against the Government as a substitute for individual liability of the agent but explained that "the sovereign remains immune to suit."²

Chief Justice Burger, in a dissenting opinion, expressly suggested that Congress develop an alternative to a Bivens remedy to permit the "government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."³ Justice Black, in dissenting from the Bivens ruling, predicted the adverse consequences to the Government that could flow from a policy of making its agents individually liable for Constitutional violations. He observed then, "There is . . . a real danger that such suits might deter officials from the proper and honest performance of their duties."⁴

Eleven years after Bivens, the sovereign is still immune to suit for infringements of its citizens' Constitutional rights. Thus, Federal agents are charged with a responsibility for making sophisticated Constitutional judgments, in the heat of action, about questions which divide lawyers and judges even after they have had the benefit of scholarly arguments and leisurely deliberations. These agents of the Government are without the protection of the doctrine of respondeat superior, which their counterparts in the private sector enjoy with respect to torts committed within the scope of their employment.

S. 1775 is the latest in a series of legislative proposals made during the last three Congresses to waive the Government's immunity, to grant immunity to Federal officials acting within the scope of their employment,

² Bivens v. Six Unknown Named Agents, supra, at 410.

³ Supra, at 421.

⁴ Supra, at 429.

and to open the national fisc to make whole the victims of Constitutional torts. As S. 1775 comes under consideration, it is well to recognize that its enactment is just as crucial to budgetary reform as other measures that are designed expressly to lead to economic solvency. It is also well to give thoughtful scrutiny to the efficiency of the judicial scheme of individual liability now in existence and to the identifiable benefits and costs of that scheme.

Bivens suits are intended to yield two benefits: deterrence of official misconduct or, alternatively, punishment of misconduct; and restitution to victims of Constitutional torts. The Department of Justice estimates that there have been possibly 10,000 such lawsuits since 1971. Of that total, only thirteen have resulted in judgments for plaintiffs. One of the most recent judgments awarded exactly \$1.00 in damages. These sparse data forcefully suggest that violations of Constitutional rights by Government officials are surpassingly rare. They also serve to confirm the statement of former Attorney General Bell that many of the Bivens lawsuits are frivolous.⁵ In addition, this information indicates that subjecting Federal agents to suit and potential liability in their personal capacities, for actions taken in their official capacities, is a measure grossly disproportionate to the size of the problem.

It must be conceded, however, that the Bivens system does serve as a deterrent. The shortcoming of this approach to deterrence is that some Federal officials will refrain from taking any difficult or controversial actions at all for fear of being dragged into the gigantic net of litigation that exists to snag the few and widely separated wrongdoers. It is also conceded that this system punishes misconduct. Unfortunately, the system punishes the hapless Federal employees who are the objects of spurious complaints as well as the wrongdoers. Thus, the benefit of deterring

⁵ Bell, Proposed Amendment to the Federal Tort Claims Act, 16 Har. J. on Leg. 1, 6 (1979).

or punishing Constitutional misconduct, which admittedly is a product of the Bivens system, is not a benefit that is absolute.

The second benefit expected from the Bivens system is the compensation and restitution of individuals injured by Constitutional misdeeds. Yet, in the event of an egregious violation of an individual's rights, resulting in a properly and justly large award in damages, the successful plaintiff is unlikely to be able to obtain his fair compensation. The Federal employee-defendant commonly is not a person of great wealth and typically would not have the financial resources to satisfy a large judgment. No matter how large and just a jury award might be, there is no fair compensation if the damages cannot be paid. Again, this benefit also is not absolute.

Given the size of the problem, and the unfavorable consequences that accompany the benefits, the costs of the Bivens system outweigh its efficacy. There are three categories of costs: (1) the human costs to the Federal agents named as individual defendants; (2) the costs to the efficiency of the civil service; and (3) the tangible monetary costs.

There are approximately 2,200 pending Bivens lawsuits, each of which names an average of three to five Government employees as individual defendants. Thus, if we were to assume that no individual is sued more than once, from 6,600 to 11,000 Federal agents, roughly one out of every 300 civil servants, today find themselves forced to justify their official actions in court. Unfortunately for these defendants, the Supreme Court was mistaken when it stated:

Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the federal constitution, it should not survive a motion to dismiss.⁶

Quite to the contrary, an attorney possessing no more than rudimentary legal skills can frame a complaint to state practically any grievance in Constitutional terms. Such a complaint is seldom dismissed on motion, and many of the pending suits have dragged on for five or six years, subjecting

⁶ Butz v. Economou, 438 U.S. 478, 507 (1978).

the employee-defendants to a prolonged period of anxiety and uncertainty. The human costs to these employees are great during the life of the litigation: it is small comfort to them to be told that plaintiffs rarely prevail in Bivens suits so long as they perceive even a faint possibility of a financially devastating award. They may even find that, for the duration of the lawsuit, they are unable to obtain an automobile loan or a home mortgage merely because of their status as defendants to civil actions.

It is easy to imagine the discomfort and incomprehension of a defendant, unschooled in the law, who becomes embroiled in a complicated and drawn-out lawsuit. Aside from the fear of the unknown, there is legitimate concern for one's professional reputation and good name. Although the final verdict may be distant, there are persons who in the interim will subscribe to the old saw that wherever there is smoke there must be some fire.

Aside from the emotional distress experienced by those Federal agents who have the misfortune to be sued personally for alleged Constitutional violations, there are costs to the cause of good government. Employees who are defendants in Bivens suits are required to devote official time to participate in their defense and, even when not so participating, may at times be unable to pay full attention to their job duties. The greater costs, in our view, arise from the fact that the threat of personal liability is a disincentive for Government supervisors to take appropriate adverse personnel actions and for Government managers to make tough program decisions. We cannot measure the actual effect of the Bivens system on the Government's decision-making processes, but the possibility of individual liability has a chilling effect our society can ill afford as we seek to deliver essential Government services with fewer employees and funds.

In addition, the high risk of harassment in a Bivens-type suit and the danger of personal liability discourage the recruitment and retention of top-notch individuals who otherwise are drawn to public service. Many Federal jobs offer unmatched challenges which attract competent, creative,

and dedicated people. Yet, when the rewards of Government service are weighed against Bivens exposure in a highly litigious society, Federal employment loses some of its appeal.

We have heard about valuable agency employees who have retired prematurely or resigned to escape the Bivens environment. We do not know how many potential applicants have backed away from the prospect of Government service because of this environment. We believe that there is not a large problem at the present time because knowledge of the Bivens system is limited generally to the employee-defendants and their colleagues and to high-level agency officials. Applicants and employees are not warned that Federal jobs may be hazardous to their psychological and financial health. The longer that the Bivens system exists, however, the higher the probability that publicity and word-of-mouth communications will inform all incumbent and would-be Federal employees of the perils of personal liability. The Government cannot tolerate the loss of personnel talent that is the foreseeable result.

The human costs to the Federal employees trapped in Bivens litigation truly are an unconscionable burden which the Government has condoned until now. The costs to the efficiency of the administration and enforcement of Federal laws are undeniable. There also are substantial budgetary outlays that cannot be justified in terms of cost effectiveness.

The impact on the budget of the real money costs associated with the defense of Bivens lawsuits cannot be computed precisely. In 1979, however, the Department of Justice prepared estimates at the request of the Subcommittee on the Constitution, which was then considering proposed amendments to the Federal Tort Claims Act to waive sovereign immunity with respect to Constitutional torts.⁷ According to those conservative estimates, the average attorney time devoted each year to pending Bivens suits is 63 hours per case. The Office of Management and Budget has calculated attorney costs at the Department of Justice to be \$42 an hour.

⁷ Letter from Patricia M. Wald, Assistant Attorney General, to Birch Bayh, Chairman, May 10, 1979.

Thus, based on these factors, the average yearly expenditure per case, just for the time spent by Justice attorneys, is \$2,646. Multiplying this figure by the present case load of 2,200 yields an annual total of \$5,821,200. What must be added to this total is the payment of private counsel by the Department, which runs about \$500,000 a year. The additional costs expended by agency attorneys and other officials on these cases would take us well beyond the ten-million-dollar mark, and that is a great deal of money to obligate to redress Constitutional violations that occur at an average rate of less than two per annum.

Although the total costs of Bivens suits have not been tracked, it is clear that they are expensive--exceedingly expensive when compared with their benefits. A former United States Attorney who testified on S. 1775 before this Subcommittee last November described one case which he believed could alone have cost the Government between \$250,000 and \$500,000 to defend.⁸ Moreover, it is clear that there are significant opportunity costs related to the system the courts have created to vindicate Constitutional rights: the time and energy spent by the Executive Branch on the drawn-out judicial proceedings required to separate the few meritorious claims from the many frivolous ones cannot be available for the pursuit of other Government interests.

The question now before this Subcommittee is whether the purposes of the judicially-created scheme of individual liability can be achieved through other means, with equal effectiveness and at less expense to the taxpayer. The Office of Personnel Management is convinced that the answer to this question is in the affirmative.

Enactment of S. 1775 would eliminate automatically the human costs attendant to the Bivens system by granting personal immunity to Federal employees for acts carried out within the scope of their employment. Elimination of the costs to good government similarly would be automatic with the disappearance of the Bivens disincentive for civil servants to

⁸ Statement of Jerome F. O'Neill, November 13, 1981.

make tough decisions. In addition, it is our opinion that substitution of the United States as defendant in Constitutional tort actions can lead to a decrease in the financial costs of resolving such actions. There are three principal reasons enactment of S. 1775 may reduce financial outlays required to defend such actions:

(1) We believe that there will be fewer Constitutional tort suits if individual Federal employees are unavailable as targets of private vendettas.

(2) Substitution of the Government as sole defendant will simplify the tort suits significantly.

(3) The Government as sole defendant will be able to settle cases and thereby avert the higher costs that would be required for litigation to the bitter end.

As to the first reason, viewing the history of 10,000 Bivens lawsuits and only thirteen judgments, the query arises as to why plaintiffs persist in filing such suits when their rate of success is so low. The answer appears to be that plaintiffs are seeking retribution against Federal agents whose official actions have denied material or psychic gains sought by plaintiffs. The courts clearly should not be accessible to plaintiffs who wish to pursue private vendettas and to have a personal role in punishing public officials for real or imagined slights. Even though victims of criminal acts understandably might desire revenge, our legal system allows only public prosecution of accused criminals. Given the draconian penalties that, as damage awards, can be imposed upon individual defendants in Bivens suits, the filing of such a lawsuit is tantamount to private indictment of public officers for alleged Constitutional violations. If Congress closes the Bivens avenue for private prosecutions, we feel that Constitutional tort actions based solely on vindictive motives will not be initiated.

The second reason that passage of S. 1775 can save money in the litigation of Constitutional torts is that cases will be much less complex when

the United States is the only defendant. Bivens suits are complicated enormously by the naming of multiple employee-defendants whose individual interests differ and whose concerns may not coincide with those of the Government. The Department of Justice suggested in 1979 that amendment of the Federal Tort Claims Act to give personal immunity to Federal employees could save as much as 35% of the direct litigation costs by substantially reducing the discovery process.⁹

The third cost-saving factor would come from the Government's ability to settle cases if S. 1775 waives sovereign immunity as to Constitutional torts. The Government, of course, cannot settle Bivens suits because it is the employee-defendants who then would have to pay. Thinking about the recently concluded case in which the court awarded \$1.00 in damages, and without knowing what the litigation costs totaled in that instance, it is safe to say that the Government would be dollars ahead today had there been an early settlement.

Thus, we see that enactment of S. 1775 would enhance the Bivens objective of compensating victims of Constitutional torts by providing a solvent defendant, the United States Government. In addition, there is a good possibility that budgetary economies might result; and it is clear that Federal employees and Government efficiency would be favored. Plaintiffs win the assurance that judgments will be satisfied and lose nothing but the opportunity to file nuisance suits against objects of their personal animosity.

Detractors of S. 1775 have based their objections to this legislative proposal largely on the notion that the judiciary's involvement is necessary to see that Federal officials abide by Constitutional principles and to ensure the punishment of transgressors. What has been overlooked is that members of the Executive Branch take the same oath to uphold and defend the Constitution as do members of the Judicial Branch. It is the responsibility of the Office of Personnel Management and the Executive

⁹ Letter from Patricia M. Wald, supra, n. 7.

departments and agencies to set standards of conduct for employees and to enforce discipline. We urge the members of Congress to recognize and preserve the authority of the Executive Branch to discipline its agents.

The head of an agency, or his designee, has the inherent authority to penalize employees for misconduct. Readily available sanctions include suspension without pay, reduction in grade, pay, or rank, and dismissal. The existence of such potential penalties, which may be imposed in cases of Constitutional abuse, serves in itself as a deterrent to such abuse. It may appear at first glance that dismissal of a Federal employee does not match the severity, either as deterrent or as punishment, of liability to pay an enormous sum in damages awarded by a court. When we look more closely, though, we know that few Federal employees are in a financial position to satisfy large judgments. Such judgments admittedly still can lead to financial ruin. Yet dismissal of a Federal agent for violating an individual's civil rights, unlike the chance removal of an employee during a reduction in force, is equivalent to a loss of livelihood. The employee removed during a RIF, through no fault of his own, indeed loses a job; but he suffers no disadvantage in seeking another position because his discharge was not personal to him. By contrast, a Federal official fired for Constitutional abuses has a stain on his record which makes him unsuitable for reemployment in a similar job.

There are other options open to an agency when it acts to enforce discipline. For instance, if an agency receives a complaint of a Constitutional violation committed by one of its employees, the agency may decide in appropriate instances to refer the case for possible criminal prosecution. 18 U.S.C. § 242 makes it a crime to "willfully" subject a person, under color of law, "to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."

Any agency may choose to refer an allegation of a Constitutional violation to be prosecuted as a crime. There is a dramatic aspect to this

approach which administrative sanctions alone, or indeed even Bivens suits, do not possess. Thus, the approach may be highly effective in deterring misconduct in particularly sensitive or troublesome areas. An agency does not forfeit its ability to take administrative action by referring a complaint for possible criminal prosecution. Whether or not a prosecution results in conviction, the agency retains the discretion to assess penalties. Even if prosecution is declined, agency sanctions may be imposed.

The Office of Personnel Management has a special concern about lawsuits brought against Federal officials which seek to hold them personally liable for personnel decisions. Such decisions include geographical or organizational reassignment, non-selection for promotion, and other unwellcome personnel actions. More and more we are seeing Bivens suits that allege the commission of Constitutional torts in the context of personnel actions. This development mirrors the now common practice by employees who challenge adverse personnel decisions in administrative proceedings to couch their grievances in Constitutional terms. Federal employees who claim that their superiors have denied them rights protected by the Constitution, however, do not need to invoke the powers of the Judiciary to obtain punishment of superiors guilty of Constitutional misconduct. The Office of the Special Counsel of the Merit Systems Protection Board is an independent prosecutor with responsibility for receiving and investigating charges of such misconduct. The Special Counsel has full powers to pursue any person's allegations of the commission of prohibited personnel practices; all Constitutional violations have been made prohibited personnel practices by the Civil Service Reform Act.¹⁰

Where the Special Counsel investigates an alleged Constitutional violation, finds a Federal official culpable, and prosecutes a complaint before the Merit Systems Protection Board, the Board has authority to impose a full range of disciplinary actions, consisting of the following:

¹⁰ 5 U.S.C. § 2302(b)(8), (11).

- (1) discharge;
- (2) reduction in grade;
- (3) debarment from all Federal employment for a period not to exceed 5 years;
- (4) suspension;
- (5) reprimand; or
- (6) assessment of a civil penalty not to exceed \$1,000.¹¹

The potential severity of the disciplinary action that a culpable Federal official can face is such that there is a sufficient deterrent to wrongdoing. Certainly, the threat of Board discipline will keep the Executive's agents from running amok with citizens' Constitutional rights, a situation the detractors of S. 1775 posit as their fear, but without supplying any justification that wholesale Constitutional torts are an inevitable result if Federal officials are granted personal immunity for acts taken within the scope of their duties.

The Special Counsel and the Merit Systems Protection Board, of course, have no jurisdiction with respect to alleged Constitutional torts whose putative victims are not Federal employees. Every agency, however, has clear authority to take disciplinary action against its own employees. Although an individual agency cannot levy a civil fine or debar an employee from the Federal service, surely the threat of reprimand, suspension, or dismissal itself is a powerful deterrent. In addition, the Office of Personnel Management has the authority to debar an official from Federal employment for a period of up to three years.

In summary, the Office of Personnel Management believes that a grant of personal immunity for Federal officials is necessary to ensure that they will make the correct decisions required of them in managing their programs and their personnel. S. 1775, while retaining a significant role for the Judicial Branch, would diminish if not eliminate the filing of vindictive actions against agents of the Government by immunizing them from personal liability. In exchange, S. 1775 would herald a revolutionary waiver of

¹¹ 5 U.S.C. § 1207(b).

sovereign immunity that is not just consistent with, but transcends, the libertarian impulse which underlies the Bivens decision and its progeny. With the passage of this proposed legislation, the sovereign United States would adopt as the most munificent of goals the protection of the rights guaranteed its citizens by the Constitution. Moreover, this Government would ensure that all individuals injured by Constitutional torts would indeed be made whole and not have their full recovery denied by the limitations of the personal finances of Federal employees. Finally, the panoply of administrative and criminal sanctions available to the Executive Branch, combined with oversight by the Congress, constitutes sufficient deterrence to ensure that Federal agents take care to avoid the commission of Constitutional violations.

Senator GRASSLEY. Our next witness is the Assistant Attorney General for the Justice Department, Mr. J. Paul McGrath. Mr. McGrath came from the New York law firm of Dewey, Ballentine, Bushby, Palmer and Wood. Accompanying him is Mr. John Euler.

At the outset, I want to thank you, Mr. McGrath, for making the fine services of Mr. Euler available to my staff in working on some of the details of this legislation.

It is my understanding, Mr. Euler, that you are Assistant Director of the Torts Branch, Civil Division, Department of Justice?

Mr. EULER. That is correct, Senator.

Senator GRASSLEY. I would like to have you proceed and we will put your statement in the record.

STATEMENT OF J. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, ACCOMPANIED BY JOHN LODGE EULER, ASSISTANT DIRECTOR, TORTS BRANCH, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. McGRATH. What I would like to do is just summarize briefly the statement which we have submitted, as I understand it will appear in the record.

I would like to say Mr. Euler and I are both pleased to appear here today in support of S. 1775, the bill which would make the United States the exclusive defendant for all torts committed by Federal employees within the scope of their employment.

As you know, the Civil Division of the Justice Department is charged with the responsibility of providing present or former Federal employees who are sued for torts, principally in so-called *Bivens* cases, representation. Mr. Euler and his group are primarily, on a day-to-day basis, responsible for providing the defense in these lawsuits, and, therefore, are intimately familiar with them.

The Deputy Attorney General, Edward Schmults, previously testified before this committee and our purpose for coming here today

is mainly to respond to several points which were made earlier and to respond to any particular questions that the committee has.

We did, however, also want to express our sincere appreciation for the chairman's effort in this area because we regard this as a very important area of legislation. This whole situation has created very difficult problems for Government employees and a situation in which people, who are damaged by actions of Government employees, have an inadequate remedy. These hearings have certainly brought out what the problems are on all sides, and we believe, because of your leadership, this has brought the situation to a point where—at which legislation is possible.

The three main problems that are addressed by this legislation are, first, that a great number of lawsuits have been filed against Federal employees, essentially, for doing no more than carrying out the duties that the Congress and the President have ordered them to perform.

The number of suits have been increasing at an alarming rate, and the thing that struck me, having just come from private practice, on the basis of many years of defending or bringing lawsuits, I do not know of any other group of comparably situated individuals in the country who have no protection against actions committed within the scope of their employment.

I think it is an alarming situation that Government employees are put in this situation because the cost to good government, the chilling effect on actions of Government employees and the diversion of governmental resources that result from this hurt the people of this country very broadly.

The second problem is, of course, that the citizen harmed by improper action, by governmental action, has no effective remedy today. By and large, the greater the harm, the greater the damage to the individual, the less chance the individual has of collecting because, by and large, Government employees simply do not have the money to respond to a damages judgment.

And the third problem, certainly which Mr. Euler and I see every day of the week, is that the complications that have arisen from the current situation are such that it creates an enormous number of problems, not the least of which is that by and large, these lawsuits cannot be settled once they are brought because the individuals do not have the wherewithal to settle them, and in most cases the Government is unable to settle them.

We believe that the bill which you have proposed is the fairest and most workable way to avoid the problems that we now have and to provide the citizens who are injured with an effective remedy.

I would like to touch briefly on some of the principal arguments that have been raised against this legislation.

The first is the argument that this legislation would somehow make governmental employees less accountable. It would take away the deterrents that otherwise exist to illegal action. Our problem with that argument is principally that the main deterrent effect that the current situation provides is that it deters Federal employees from carrying out their duties. It makes them timid. It makes them less likely to be innovative in the performance of their duties and that can only, in the long run, harm the general public

welfare. The argument that deterrents will somehow be eliminated if this legislation is passed is also undercut by the fact that there are a number of other sanctions available today such as punishment by the agency, loss of livelihood which has occurred in a number of cases, injury to the reputation of the individual if it is found in a lawsuit or in an administrative proceeding that the wrong thing had been done by the employee, and criminal prosecution.

Now, second—and this came up several times this morning—there seems to be a preoccupation by many of the people that have questions about this legislation, with the fact that the cases involved are law enforcement-type cases. The fact is that, at least, our statistics show that only about one-third of the pending cases involve law enforcement-type situations and that more and more cases are being brought against what we call citizen-level workers in all areas of Government who are dealing with people in welfare situations, or housing situations, or even agriculture, or forestry, type situations.

These are not high-level governmental officials for the most part, although obviously some of the more publicized cases have been against high-level officials. They are suits against Government officials of all levels.

Our bottom line analysis of this legislation is that the current situation does not work. Indeed, in thinking about it, it is hard to imagine a system that on a balance could be much less effective than the present situation. We are not talking about legislating for all time here. If the legislation currently proposed turned out to have some problems, turned out to need modification, that can be done. But it certainly seems to us to make sense that, in the meantime, the legislation proposed is a good balance, and would create a much better situation than we have now.

Mr. Euler and I would be pleased to respond to any questions that the committee has.

I believe you indicated, Mr. Chairman, you would be interested in some of Mr. Euler's views, since he has been dealing with this situation on a day-to-day basis for a number of years.

Senator GRASSLEY. First, I want to compliment him, if I have not already done so, for being so patient in working on some of the details of this legislation, and in explaining to me as a nonlawyer all of the intricacies of this, which is something that I have been interested in since I was in State government.

Do you have a statement to make, Mr. Euler?

Mr. EULER. Thank you, Senator.

You are very gracious, certainly, in complimenting me. We certainly appreciate the effort of your subcommittee, yourself, and your fine staff.

I would only add that I think it is clear from the tremendous record that has been developed before this subcommittee that the system in fact does benefit no one, whether we are talking about the Federal employee, or whether we are talking about the wronged citizen, or the Government, and the taxpayers as a whole.

There has been a bipartisan effort to remedy this problem for the last three Congresses. We think now that you have developed a record that enables us to go forward in what we hope will be a

rapid fashion. I do not think any of the witnesses that have appeared before the subcommittee would dispute the point that certainly this bill is a big improvement over the current system and, given that kind of a situation, we would hope and think that it could proceed rapidly and that if it doesn't work out, certainly things can be done in future years and future Congresses to make necessary changes.

Thank you.

Senator GRASSLEY. Before I ask questions, one of the things I want to say, and I guess this is more procedural than substantive, we hope from the Assistant Attorney General's position within the Department, and also from the Cabinet Members, and the Office of Management and Budget, that we can get the administration to really make this a key issue. I am making that point with other Members of the Senate.

I would appreciate that.

Mr. McGRATH. We will certainly bring that to the attention of the appropriate people, Senator.

Senator GRASSLEY. It has been suggested that the Federal Tort Claims Act be amended to allow Government officials who are sued individually under *Bivens* to implead the United States if the defendant could demonstrate that he or she is entitled to a good faith defense.

This would allow the individual defendant to pass the cost on to the Government whenever it was shown that an individual acted in good faith, even though his actions resulted in violating the plaintiff's constitutional right. You have heard that proposal, and I would like to have your view on it.

Mr. McGRATH. I would like Mr. Euler to respond to that.

Mr. EULER. The bottom line of that proposal is it is unworkable. A witness earlier today indicated that that does not relieve any of the problems that we are currently faced with. The employee would still be faced with the fact of the lawsuit, would still be faced with the proposition of having to go through the entire lawsuit on a personal basis, and would be faced with the prospect of a judgment. So if anything, that proposal, frankly, exacerbates the situation. What particularly indicates that is that that proposal would pit the Government against the employee in every case. Clearly, we cannot represent an employee who sues the Government, who tries to implead the Government.

So the practical effect of that would be that the employee in every single case would have to hire his own lawyer to litigate the case against the Government at his own expense.

So we think that that proposal is not only unworkable but would make the current system undoubtedly much worse.

Senator GRASSLEY. On another point, could you elaborate on why we should not be providing attorneys' fees to successful plaintiffs if, in fact, you feel that is the way it should be?

Mr. EULER. Our position is, first off, there is no need. When attorneys' fees have been provided by legislation, they have been provided in the area of equitable relief, where simply one party is suing another to get the court to require the other party to do something. In the law of torts, attorneys' fees are generated by the award itself, so attorneys' fees already exist in the system. To have

them superimposed on the provision for attorneys' fees that already exist in the common law is superfluous and there is no need for it. The Federal Tort Claims Act already has a specific provision that provides for a certain percentage of the recovery to be used as attorneys' fees and it has worked since 1946, and we would submit that it would continue to do so.

I think the other problem that we see as lawyers for the Government is that we would end up spending an awful lot of our time litigating in court the issue of attorneys' fees. Certainly, if they are provided for constitutional torts, every lawyer worth his salt will try to plead his case in terms of a *Bivens* or constitutional violation so he can get attorneys' fees, and instead of us focusing in court on the merits of the underlying conduct, on getting to the facts of what happened and whether the plaintiff should recover, we think we will spend a tremendous amount of time litigating these pleas that the lawyers file in order to try to get attorneys' fees, and beyond that, litigating whether the fees they are asking for are reasonable in the first place.

So, frankly, it tends to invite a lot more litigation than we currently face, and we do not see any problem historically in the way the current attorneys' fees situation has worked out under the Federal Tort Claims Act.

So for that reason, we think that system should continue to pertain.

Senator GRASSLEY. Mr. McGrath, or Mr. Euler, in regard to this good faith immunity, it has been contended that for the good faith immunity to be a deterrent factor in these cases, the Government must prove objective as well as subjective good faith of the employee. The Government must not only prove that the employee had good faith, but that an individual facing similar circumstances could have or would have acted in a like manner.

If the Government can satisfy this criteria, has a tort actually been committed by legal definition?

Mr. EULER. Our contention is not. We think the good faith defense, to expand on a point that Mr. Richardson made earlier, really goes to the merits of the case.

In other words, the question would be, has a wrong occurred at all if the Federal officer was, No. 1, acting reasonably, and No. 2, acting in good faith. It is a two-pronged test and if we fail on either of those tests, then of course we lose the test.

So what it really does, frankly, historically, going a long way back to English common law and a defense to false arrest and imprisonment, permits the plaintiff to test the actions of the officer against this test of reasonableness and good faith.

I think the other big point, Senator Grassley, is, if we eliminated the good-faith defense, the plaintiff would not get his day in court on that issue. In other words, the plaintiff has called into question the conduct of a Federal officer and one of the primary reasons to do that is to ventilate his grievance. If we are not even going to talk about the good faith of an officer in the course of those proceedings, the plaintiff frankly is robbed of that forum, and we think that is a very, very serious disability.

One other point: the good-faith defense is a kind of protection against the proposition that it is awfully hard to figure out what

the Constitution requires sometimes. Officers are called upon—and all employees are called upon on very short notice, under very tough circumstances, to make very difficult decisions which a court may decide had constitutional overtones.

To give the Senator an example, in a case already decided, the case of *Wood v. Strickland*, a school board was taken to task for suspending a student. The school board interpreted the Constitution one way. The district court interpreted it another way. The court of appeals a third way and the Supreme Court a fourth way. It is the presence of the good faith that enables us to get to the heart of the underlying conduct. Was it good or bad. That is what that issue is all about, and that is why it should stay in the bill.

Senator GRASSLEY. I would like to ask a question that I also asked of Elliot Richardson and it involves the Federal Tort Claims Act being interpreted to provide a remedy only against acts or omissions that are tortious under State law in the jurisdiction where they occurred.

Would you be in favor of distinguishing Federal law torts into the remedial structure of the Federal Tort Claims Act?

Mr. EULER. The bill would apply Federal law to the constitutional tort area. Since 1946 in the common law tort area we have relied on State law to define the substantive rights and duties.

Frankly, because such a body of case law has built up in that regard, I think we would have to study very carefully any proposal to impose Federal common law on the common law tort.

But certainly in the constitutional area, where there is a particular Federal need and interest, the important thing to realize, is that it's going to be the Federal courts that are developing that law and that should be the standard we are talking about.

I hope I have answered that question satisfactorily.

Senator GRASSLEY. I have a point from Mr. Devine's testimony that I want to ask you about.

On page 13 of his testimony he states that a Federal official who is found guilty of constitutional abuses has a stain on his record which makes him unsuitable for reemployment in a similar job.

Under provisions of this bill the Government would be allowed to settle cases. Do you anticipate that a settlement would have any effect on an employee's Federal record?

Mr. EULER. The bill does require when we settle a case, as well as when we lose a case in trial, that the Attorney General refer the matter to the agency to explore the conduct, to see what happened and to see whether disciplinary action is appropriate.

Certainly to that extent, when we settle a case, the employee's conduct will be looked at. He does have a very important interest in his reputation, his professional reputation, and his reputation for integrity which we think is a major deterrent factor. That is another reason why we think the good-faith defense is important, so that the employee can vindicate that interest at trial and also so that the plaintiff can challenge it.

Senator GRASSLEY. One last question: also referring again to Mr. Richardson's testimony, he focused on high level officials in his testimony.

We have heard from other witnesses at prior hearings who could not be considered upper echelon.

Do you have any breakdown in each grade that has been sued or if you do not have it, would it be possible to get it?

Mr. EULER. I do not have a specific breakdown. However, every one of these cases comes across my desk, and from my experience, the percentage of high level versus low level officials, if I may take the liberty to use that term, is that the vast number of suits are against the low level, the case worker, the law enforcement officer.

Senator GRASSLEY. People who are not even in a supervisory capacity?

Mr. EULER. That is correct. They are the ones that interact with the citizenry as you can imagine, and therefore they are the ones that incur the wrath of people that do not like what is happening to them at a particular time.

If I had to speculate, and that is what I am doing, certainly 90 percent of the cases involve what we refer to in our testimony as citizen level officials. I think that is a terribly important point. I think certainly the testimony that has occurred on prior hearings has shown that and, frankly, I am a little struck by the lack of compassion of some of the opposition in that regard. What we have, for want of a better word, is the fact that the real workers here are being hurt, and all they are trying to do is carry out the mission of the Congress and the President.

Senator GRASSLEY. Do you suppose now the multitude of cases in this area—that this percentage of low level to high level employees would be about the same as when there were a lot less cases, fewer cases, I should say, years ago?

Mr. EULER. I think probably the expansion we have seen, Senator Grassley, is primarily in the suits against lower level officials. I think people are beginning to become aware they can sue them. So in terms of history, although I am really speculating, I think that is where we have seen a tremendous increase, although since the *Bivens* case in 1971 it has been a geometric increase against all officials at all levels.

Senator GRASSLEY. I think if your off-the-cuff analysis is correct, for those people who have been complaining about this legislation and what it might do, we need to make them more aware of it. I would say that for some of the organizations, like the AFL-CIO as an example, that it might be more meaningful to them.

Mr. EULER. We would be happy to assist you and your staff in doing that.

Senator GRASSLEY. I have no further questions.

We will probably have some questions in writing.

So I thank you very much. We appreciate your patience and, once again, let me apologize for being down at the full Judiciary Committee.

[The prepared statement of Mr. McGrath follows:]

PREPARED STATEMENT OF J. PAUL McGRATH

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to appear before your Subcommittee in support of S.1775, a Bill which would make the United States the exclusive defendant for all torts committed by federal employees within the scope of their employment and would, for the first time, make the United States liable for constitutional torts. The Bill would provide for the substitution of the United States for defendant employees acting within the scope of their employment in all suits alleging common law or constitutional torts.

With me is John L. Euler, an Assistant Director in the Civil Division which I head at the Department of Justice. Among my duties as Assistant Attorney General of the Civil Division is supervision of the representation and defense of federal employees personally sued in their individual capacities. Mr. Euler and his immediate superior, Torts Branch Director, John J. Farley, III, are immediately responsible for this effort and Mr. Euler is therefore intimately familiar with our day-to-day practice of law in this area. Deputy Attorney General Edward C. Schmults has previously testified before you concerning S.1775 and conveyed the Administration's strong support for this initiative. My purpose this morning will be to briefly sum up the case for the Bill and urge its prompt enactment.

Mr. Chairman, at the outset, it seems appropriate to express our appreciation for your leadership in this vital area of defining the civil law relationship between the government, its public servants and the citizenry. We are further along the path of resolution of this problem than ever before. That is because of the efforts of you and your fine staff. Due to that effort a complete and detailed record has been developed in the course of these hearings and the many

written submissions. The problem has been defined; a solution proposed. Proponents and opponents have stated their cases. All of the concerns and questions seem to have been fully discussed. For example, the testimony submitted today by the Office of Personnel Management makes an eloquent and persuasive case for S.1775. We are now at the point where concrete legislative action is appropriate and supported by the record.

To briefly summarize, we understand S.1775 to be responsive to three problems. First, it addresses the large number of suits filed personally against federal employees at every level of the government for doing no more than carrying out the duties which Congress and the President have ordered them to perform.^{1/} We estimate that there have been 7,500 to 10,000 of such suits since 1971. They are increasing. If an employee suffers an adverse judgment, with very few exceptions, it is he or she who must pay it.^{2/} It is shocking to think that these individuals have no protection. No other group of employees or professionals lies so exposed to personal catastrophic loss through legal action as federal public servants. I submit that every other identifiable group in our society is protected by some form of indemnity, subrogation, insurance, or the law of respondeat superior. As a first principle, it is terribly unfair to ask them to bear such a burden. Beyond that, the cost to good government from the combination of chilling effective action, diverting resources and talent, shortening laudible careers, discouraging quality recruitment and requiring endless, non-productive litigation is incalculable. The record before this Subcommittee contains mention of each of these detriments.^{3/}

This leads to the second problem addressed by the legislation. The citizen has no adequate remedy. The United States cannot be sued for a constitutional tort.^{4/} The modest assets of the public servant are the only available resource. Even then he may not be suable because he may not

be subject to the personal jurisdiction of the court or amenable to personal service of process.^{5/} Of the thousands of cases, there have been very few judgments^{6/} and very few of those have, in turn, actually been paid. This not only demonstrates that federal public servants have a good record that does not justify a constant threat of personal lawsuits but also shows the futility of a claimant pursuing that route. The only realistic motivation then becomes that of engendering individual fear and personal trauma. This has never been recognized as a proper method of controlling government or as a philosophic basis for tort law. Thus the current system is self defeating for all concerned.

The third problem is the expense, complexity and protracted nature of the cases engendered under the present scheme. Because the constitutional tort or Bivens case concerns the personal finances of the individual defendants it can only in the rarest of cases be settled. Because multiple defendants are sued in almost seventy-five percent of the cases, conflicts of interest sometimes arise and the Department hires private counsel to represent each group whose factual positions collide.^{7/} Three million dollars has been spent in that regard since 1976. In addition, because individual liability is at issue, the trauma experienced by individual employees requires a tremendous degree of attorney time devoted to soothing the anxieties of the client and resolving issues of potential conflicts of interest.^{8/} The decisions that must be made by both clients and attorneys at the Department of Justice in these cases are often excruciating. These factors must be dealt with despite the fact that most of the lawsuits are wholly without merit and will be eventually disposed of on motion. Yet for the same reasons, (multiple defendants and personal interests) many of the cases will become exceedingly complex and proceed to resolution, if at all, at a snail's pace but at large expense to both parties,

plaintiff and defendant. Thus, from any reasonable perspective, the current scheme of civil tort liability is a failure.

S.1775 would resolve each of these problems in the fairest and most workable way that has been suggested to date. Public servants would no longer be subjected to the spector of the loss of their homes and their childrens' education for actions taken in the scope of their employment. At the same time, their conduct would just as surely be amenable to the scrutiny of the courts through an action brought against the United States where even the good faith and reasonableness of their actions could be challenged. The citizen would not lose his day in court. Rather he would gain a greater guarantee of having a hearing in a judicial forum. The citizen would be presented with a defendant amenable in every case to personal jurisdiction and service of process, who would be in a position to settle cases and who could pay the adverse judgment that might result from trial. Cases would proceed much more expeditiously to resolution with the cost to both parties drastically reduced. To paraphrase an earlier witness in these hearings, the original plaintiff, Webster Bivens, would fare better under this legislation than under existing case law.

Opponents to this legislation^{9/} raise primarily an argument based upon the principle of accountability. The reasoning is that the current sword of Damocles which hangs over the head of the public servant prevents him or her from doing wrong. The short answer is that it prevents him or her from doing what is right. "The deterrence we have is that of deterring federal employees from doing their duty."^{10/} The knowledgeable official who is aware of the state of the law cannot help but face a difficult decision with trepidation because of, what should be an extraneous, consideration for his or her personal welfare. The welfare case worker, the

probation officer, the meat inspector, the contract officer, the revenue agent, the congressional staffer, the law enforcement officer, the personnel manager, the job foreman, the federal veterinarian, even the forest ranger are at least given pause and perhaps prevented from carrying out the very mission that Congress has set for them. This state of affairs means that the taxpayers are not getting the quality of service for which they are paying.

In addition, I submit that the accountability argument places undue emphasis upon a damages remedy and ignores the plethora of other sanctions available ranging from agency punishment, including loss of livelihood, to a finding that the actions were beyond scope of employment and not actionable against the United States, to injury to professional reputation, to criminal prosecution. Moreover, I submit that a letter from the Attorney General to the head of an agency calling into question the conduct of an employee whose actions have been found sufficiently lacking in good faith or reasonableness to require payment of a claim will be taken very seriously indeed. This Bill would require such a letter. The damages remedy is one small piece of the pie and the people of the United States pay far too large a price for it.

In the same vein, it is important to note the preoccupation of the opposition with law enforcement torts. The original Bivens case arose out of law enforcement and that has been the traditional way to think of this area of the law. However those kinds of cases are now a decreasing percentage of the whole. As I have noted, there are cases arising generally from personnel matters and from virtually every other government activity. Excluding cases filed by prison inmates, these three types (general government, law enforcement, personnel) are the three main categories of current filings. The law enforcement cases appear to make up somewhat less than a third.

Equally important to note is that this legislation is not designed for the relief of past and present high level officials. Based on our experience at the Department of Justice, the people who are now being sued in increasing numbers are the citizen-level workers of government, the professional and non-professional public servants who are charged with directly administering the services mandated by the Congress and the executive.^{11/} That brings us to the final major argument of opponents to S.1775.^{12/} It sounds in the proposition that there may be an occasional miscreant who escapes retribution should the legislation be enacted. First, as a result of the system of sanctions and subjective restraints, such as professional reputation, already in place and documented in this record we think that eventuality to be unlikely. Secondly, in order now to be sure of having the narrow, yet unlikely, legal possibility of punishing the very few through civil damages, we have placed in jeopardy and confusion the functioning of all civil servants and have not correspondingly provided the plaintiff with a remedy that he can expect to be realized. In other words, the current "remedy" is grossly disproportionate to the problem.

In the final analysis then, the system as it exists simply does not work. Few would dispute that S.1775 represents an improvement. Most, including both victims of torts and victims of suits, would conclude that it represents a great improvement. Thus it is clearly in the public interest to pursue S.1775 to enactment. It bears remembering that the scheme established by the Bill would not be irrevocable. As experience dictates, it can be modified by appropriate legislation to achieve greater equity and efficiency should the need arise. We can certainly do no worse than that which now exists. I also submit that we will indeed have done much better should this proposal become law.

Mr. Chairman, we would be pleased to respond to your questions.

FOOTNOTES

1/ In an article entitled "Suing Our Servants" appearing in the 1980 edition of The Supreme Court Law Review published by the University of Chicago, (page 281), Peter H. Schuck, Associate Professor of Law, Yale Law School, makes a convincing case for the proposition that the most frequent targets of such suits are the everyday public servants who operate at the level which deals directly with the public; e.g. the welfare or social service case worker, the safety inspector, the hospital administrator, the law enforcement officer, etc.

2/ There are some limited classes of employees who may, by specific statute, be held harmless or insured by their department or agency heads within the latter's discretion. 10 U.S.C. 1089(f) (DOD medical personnel); 38 U.S.C. 4116(e) (Dept. Medicine and Surgery personnel); 42 U.S.C. 233(f) (certain Public Health Service officers); 42 U.S.C. 2458a(f) (NASA medical personnel); 22 U.S.C. 817(f) (Foreign Service medical personnel). These persons are already personally immune through exclusive remedy provisions virtually identical to that proposed in S.1775. The "hold harmless" provisions presumably were added to provide for the theoretical case in which an exception to FTCA jurisdiction under 28 U.S.C. 2680 might be construed to leave open a common law tort suit only against the individual. Such a final protection would be a wise provision to add to S.1775 and we would be happy to provide appropriate language.

3/ See testimony of Jerome F. O'Neill, Robert C. Lehman, John S. Martin, Jr., and William B. Cummings, of November 13, 1981. Testimony of William Howard Taft, IV, Dr. Marvin Schneiderman, Mr. Jerry Shaw and Mr. Rod Murray of November 16, 1981.

4/ Duarte v. U.S., 532 F.2d 850 (2d Cir. 1976); Norton v. U.S., 581 F.2d 390 (4th Cir. 1978); Ames v. U.S., 600 F.2d 183 (8th Cir. 1979); Jaffee v. U.S., 592 F.2d 712 (3rd Cir. 1979); Baker v. P & F Investment Co., 489 F.2d 829 (7th Cir. 1974).

5/ Rule 12(b)(2)(3)(4) and (5), Federal Rules of Civil Procedure Stafford v. Briggs, 444 U.S. 527 (1980).

6/ Written testimony of Edward C. Schmults submitted on November 13, 1981, footnote 11. In addition, we have been advised of the following four judgments:

Hobson v. Jerry Wilson, et al., D. D.C. Civil Action No. 76-1326. A total of \$711,000 was awarded seven former antiwar activists against fourteen present or retired officers of the FBI or the Washington, D.C. police department. The suit charged violation of constitutional rights during undercover surveillance activities in the 1960s and 70s. The verdict was complex, awarding different amounts for and against different parties.

Epps v. United States, et al., D. Md. CA No. J-78-2373. A judgment of \$200,000 was awarded against a Field Branch Chief of the IRS for allegedly vandalizing the property of the plaintiff while her business was in the possession of the IRS.

Nees v. Bishop, et al., D. Col. 524 F.Supp. 1310 (1981). \$1,000 was awarded to a plaintiff who alleged that the losing defendant had deprived him of his right to counsel by allegedly advising state custodial authorities that he need not see a state public defender since he had been incarcerated on a federal charge.

Clymer, Jr. v. Grzegorek, et al., E.D. Va., CA No. 80-1009-12. Damages of \$1.00 were awarded against a former federal correctional institution warden in favor of a prisoner who claimed overcrowding and understaffing led to violence and an assault upon him.

7/ Our latest figures indicate that there are 18 pending cases where private counsel have been hired. Some 41 law firms are under contract and requests are pending in 4 other cases contingent upon the realization of funding.

8/ See testimony of Messrs. Martin and O'Neill on November 13, 1981 and of Dr. Schneiderman and Mr. Shaw on November 16, 1981.

9/ See testimony of Mark H. Lynch, ACLU, of November 13, 1981 and of Alan B. Morrison and Louis Clark of November 16, 1981.

10/ Testimony of Mr. O'Neill, November 13, 1981.

11/ See also the article by Professor Schuck referred to in footnote 1 supra.

12/ Opponents have also raised an argument that S.1775 may be unconstitutional. Quite to the contrary, the Supreme Court in Carlson v. Greene, 446 U.S. 14 (1980), clearly held that Congress could declare the Federal Tort Claims Act to be an exclusive remedy but had simply not yet done so. Moreover, exclusive remedy provisions have been upheld in the past as being constitutional. See Nistendirk v. McGee, 225 F.Supp. 881 (W.D. Miss. 1963); Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968). See also, Silver v. Silver, 280 U.S. 117 (1929). Furthermore, as the testimony of the Director of the Office of Personnel Management points out today, there are suggestions in the Bivens case itself that Congress should legislate a comprehensive solution. See 403 U.S. at 412, 418 and 421.

Senator GRASSLEY. Our next witness is Charles E. Weithoner, Associate Administrator for Administration of the Federal Aviation Administration.

Mr. Weithoner, I understand that you are going to testify as to the disciplinary procedures that exist at the Federal Aviation Administration.

We are pleased to have you with us and would appreciate it very much if you would introduce your staff and colleagues.

Mr. WEITHONER. I have with me Bert Randall, who is FAA's Assistant Chief Counsel for Legislation.

Senator GRASSLEY. Would you please proceed and I would like to inform you that we will print your entire statement in the record, and if you can summarize, we would appreciate that, although I guess your statement is not very long.

STATEMENT OF CHARLES E. WEITHONER, ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION, ACCOMPANIED BY BERT RANDALL, ASSISTANT CHIEF COUNSEL FOR LEGISLATION, FEDERAL AVIATION ADMINISTRATION

Mr. WEITHONER. It is a very short statement, but we can summarize it very briefly.

We support the legislation. Several of our air traffic control specialists in the past have been sued as individuals, although none have been found personally liable. The threat of suits is great. Every time an accident happens, there is discussion of this. We have had discussions on the issue with both representatives of unions and with individual employees.

We believe that adequate disciplinary measures exist to serve as a suitable deterrent to negligent performance of duties.

In summary, we support the legislation, and we believe it would help us with the problem.

Senator GRASSLEY. Does your colleague have a statement he wants to make?

Mr. RANDALL. No, sir.

Senator GRASSLEY. I have questions that I would like to ask you.

I found from your statement that the critical nature of the controller's job is most interesting. Of course, it is a contention that we legitimately hear since there have been problems in the last 7 or 8 months. I take it that you would be inclined to believe that the fact that the lives of hundreds of passengers depend on one person would be more of a deterrent than personal financial liability?

Mr. WEITHONER. I do.

That is far and away the most important factor in these kinds of situations.

Senator GRASSLEY. You mentioned that there have been suits filed against controllers in their personal capacity.

We would like specifics.

Mr. WEITHONER. Yes; Mr. Randall can give you specifics.

Mr. RANDALL. We are aware of four cases in which controllers have been sued in their individual capacities. I do not have the citations for the cases with me today. I would be happy to supply them for the record.

Essentially, our concern, and then I will get into the specifics of the cases, is that all of these cases have arisen from aircraft accidents and when we are dealing with aircraft accidents, the potential monetary liabilities are, of course, very, very substantial. That is of substantial concern to us in these cases where our controllers have been sued in their personal capacities.

One case arose out of an accident in Charlotte, N.C., in 1976, and that was *Arnold v. Eastern Airlines*.

The United States was brought in as a third-party defendant. Eastern Airlines' insurance company then brought suit against three controllers and the chief of the Charlotte tower. The Government moved to substitute itself for the individual controllers, and that motion was denied. Subsequently, the insurance company sought to disqualify the Government from representing the controllers on the basis of conflict of interest and the district court held in their favor.

That was appealed to the Circuit Court of Appeals which concluded that in that case it would not have been a conflict of interest for the Government to have represented the controllers as well.

In that case, the damages sought were \$40 million. Fortunately, the jury found in favor of the defendant controllers and the judge found in favor of the defendant United States, so there were no damages assessed.

Another case was one tried last year, 1981, *Smith v. United States*, and that was a California case. That arose from a general aviation accident at Serabello, Calif. These were not controllers but flight service station specialists. These individuals do not actually control air traffic. They are responsible for providing weather briefings and various kinds of information to pilots.

In any event, several Federal flight service station personnel were sued in their individual capacity, and, in this instance, the judge—I guess the best way to put it is that he used his power of persuasion on the plaintiff to permit the substitution of the United States for the individual flight service station specialists, and that was done.

In this case, the damages originally sought were \$1,250,000.

The last case in which I have the facts with me was *Sachs v. United States*, which was a case tried in Indiana. That resulted from a midair collision in about 1969, I believe, involving an Allegheny Airlines flight and a general aviation aircraft.

Damages sought there were \$50 million. In this instance, the judge ruled *sua sponte* that the Government could not represent the controllers as it would constitute a conflict of interest.

So the Government found itself in the position of having to pay for counsel, private counsel for the defendant controllers. Again, we were fortunate that the court found in favor of the defendants.

So there has been a limited number of cases so far in which people have been sued in their personal capacity and, by a roll of the dice, so far none of these individuals have been adjudged personally liable.

However, as I pointed out earlier, these tremendous amounts of liability resulting from an aircraft accident are of concern to the FAA institutionally and naturally of concern to the controller work force and the flight service station specialists.

Senator GRASSLEY. A frequent complaint that we often hear is that it takes too long to discharge Federal employees.

How long did it take to discharge the Federal controllers that broke the law?

Mr. WEITHONER. Not long. The strike started August 3, 1981. We began issuing the letters of adverse action, that is the first step in the removal process, on August 6 and within a period of approximately 6 weeks we had finished the paperwork on those striking controllers who, we had established to our satisfaction had broken the law in connection with the strike. They were all removed from the rolls. There may have been a few exceptions but within 6 weeks we had taken action against approximately 11,400 people.

Senator GRASSLEY. Do you know of any private insurance available to controllers to protect them in suits like this?

Mr. WEITHONER. I do not know of any insurance of that type.

Mr. RANDALL. No, sir, I am unaware of any type.

Senator GRASSLEY. Are you going to be testifying about the striking controllers situation anytime soon?

Mr. WEITHONER. Not to my knowledge.

The strike has been discussed at a number of hearings in the House and the Secretary and the Administrator have both testified rather fully on that subject.

Mr. RANDALL. Pardon me.

There will, of course, be a number of Merit Systems Protection Board cases for those controllers that were terminated. They have a right to seek a hearing before the MSPB, and there will be roughly 11,000 of those cases coming up in the future.

Senator GRASSLEY. That is the end of our witness list.

[The prepared statement of Mr. Weithoner follows:]

PREPARED STATEMENT OF CHARLES E. WEITHONER

Mr. Chairman and Members of the Subcommittee:

I am Charles E. Weithoner, the FAA's Associate Administrator for Administration. Within the FAA, my areas of responsibility include personnel administration and labor relations, along with other administrative activities such as budget and accounting.

I am pleased to appear before the Subcommittee today to testify in support of S. 1775, which would immunize Federal employees, who act within the scope of their employment, from personal liability for torts they may commit. This is a real concern within the FAA for reasons I will describe.

As you know, the FAA is responsible for the operation and maintenance of the United States' air traffic control system. This system entails the control of literally millions of aircraft operations each year. While the safety of our air traffic control system is unsurpassed anywhere in the world, the volume of traffic, numbers of people involved in operating the system, and the complexity of the system mean that mistakes will sometimes occur; and, though rare, accidents will sometimes happen as a result of those mistakes.

Generally, the United States is a party to suits which may arise from an alleged air traffic control error. However, there have been several instances in which controllers have been sued in their personal capacity as a result of an aircraft

accident. Thus far, none have been adjudged personally liable, though that cannot be used as a basis to predict the possibility of such an outcome in future lawsuits against individual controllers. The reasons for suits against controllers in their individual capacity seem to fall into two categories: 1) the statute of limitations has run against the Federal government but not against an individual in state court; and 2) plaintiffs have apparently considered that such a suit would bring pressure on the government to seek to intervene and settle the case for purposes of worker morale. In any event, regardless of the reasons for such suits, the tremendous potential liability exposure of a controller in a suit arising out of an aircraft accident can have a seriously demoralizing effect on the workforce.

Although not as significant to the FAA, since we are unaware of any suits against FAA employees in their personal capacity for constitutional torts, we nevertheless believe this is an important element of the legislation. One of our functions as a regulatory agency is to seek to assure compliance with our safety regulations. As such, we have several thousand aviation inspectors and a small workforce of aviation security inspectors who work closely with the travelling public and the aviation community at large. It is conceivable that suits based on alleged constitutional torts could arise against these employees in the course of their work, and the protection afforded against personal liability would be beneficial not only to them but to the FAA as their employer.

I am aware of the concerns expressed by some that immunizing employees from being sued in their personal capacity could lead

to a disregard for attention to duty. I don't see that as happening within the FAA. Our employees know that the work they perform is critical to the safety of other people. Even though the risk of suit for doing one's job poorly is not a matter to be lightly dismissed, that concern pales in significance compared to the concern about doing one's job in a way that protects and does not jeopardize the safety of the travelling public. There also exist, in my opinion, sufficient disciplinary mechanisms to serve as a deterrent to negligent acts as envisioned in the proposed legislation.

An obvious and dramatic example of exercising disciplinary authority was the termination from employment of controllers who struck illegally against the government last August. Since thousands of appeals from those cases are currently pending before the Merit Systems Protection Board, I don't want to dwell on that subject other than to cite it as an example. Fortunately, we have not had to resort with any regularity to disciplinary actions within the FAA. As a general rule, the vast majority of our employees perform their work well. When it is necessary to take action against an employee, though, a variety of measures exist. Initial actions for non-serious offenses may entail oral or written reprimands; for more serious or repeated infractions, an employee may be suspended or terminated from his employment. Although these measures can certainly be time-consuming to effect, they are, in my estimation, effective for the most part in responding to the kinds of problems covered by this legislation.

In summary, Mr. Chairman, the FAA supports the enactment of S. 1775 and believes that removing the possible threat of

personal liability will not adversely impact the quality of work of our employees.

That completes my prepared statement. I would be pleased to respond to questions you may have at this time.

Senator GRASSLEY. I specifically want to thank you from the Federal Aviation Administration for testifying, and I want to thank all the witnesses who have testified today.

Our next step in the subcommittee is to write the report and make it available to the rest of the subcommittee members and the full committee. I feel that through these three hearings we have created an excellent record. I want to thank you again, as well as people in the audience for your attention. Thank you very much. [Whereupon, the hearing was concluded at 12:48 p.m.].

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD
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U.S. Department of Justice

Federal Prison System

Northeast Regional Office

Scott Plaza II, Industrial Highway
Philadelphia, Pa 19113

January 19, 1982

Honorable Charles E. Grassley
United States Senator
Chairman of the Senate Judiciary
Subcommittee on Agency Administration
Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

I note with personal interest your "Federal Times" article of December 14, 1981 regarding personal liability suits against government officials. As a loyal Federal Prison System employee, I sincerely hope your efforts are successful in establishing legislation to protect us.

As warden of two major correctional institutions in the Federal Prison System, I have been the subject of suits against me as an individual, and as an official of the U. S. Government under the Federal Tort Claims Act. I have been successful in defending the U. S. Government and myself until very recently wherein a judgement was entered against me in the amount of \$1.00. The original suit asked for \$300,000 in damages concerning an inmate who had been stabbed at the Federal Correctional Institution, Petersburg, Virginia, during my tenure as warden at that facility. The plaintiff claimed that overcrowding, pervasive racial unrest and lack of sufficient correctional officers contributed to his being the victim of an assault. Because it was a Bivens-type action, he, of course, was allowed to have a jury. While the preponderance of

evidence was on my side, the jury, I imagine, in a spirit of compromise awarded in favor of the inmate.

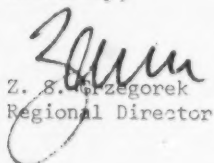
What they did not realize was that this sets a precedent for others who may imagine they have been wronged while in the Federal Prison System to take similar action. I, of course, stand ready for any judgement by the Federal Bureau of Investigation, the media and most importantly our federal court system. However, I am rather depressed over this Pyrrhic victory as it damages my reputation as a correctional practitioner with 19 years in service.

In the cases in which I have successfully defended myself and the U. S. Government, upwards of \$100,000 of taxpayers' funds have been expended. I can recall quite vividly a case which we won several years ago. Federal Judge Robert Merhige ordered the inmate to pay staff salary costs because of his frivolous court suit, which costs amounted to over \$2,000 for one day, not to mention the 11 staff members I had to take off their duty stations.

Frankly, I am disgusted as a government official and as a taxpayer over the predominately frivolous personal liability suits filed against government officials as a method of harassment hoping that we as government officials will not vigorously enforce our statutory mandates. I for one will continue to discharge my responsibilities in a manner consistent with the statutory provisions as long as I am a member of the Federal Prison System. I was promoted to my present position as Regional Director through merit and I am justifiably proud of my accomplishments, and do not intend to let an inmate and his attorneys reduce my reputation as a correctional official. I am therefore taking a grave risk in appealing the \$1.00 judgement (this may subject me to a \$300,000 judgement; a personal risk to uphold the agency), and am once again going through the anguish of a trial so that I can preserve my reputation, the integrity of the service and hopefully protect the people who will succeed me.

I wish you all success in your endeavors, and if I can assist you in any way, do not hesitate to call on me.

Sincerely,


Z. S. Grzegorek
Regional Director



Comptroller of the Currency
Administrator of National Banks

Washington, D. C. 20219

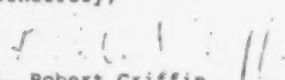
February 9, 1982

Thomas F. Stafford
Clerk, United States District Court
P.O. Box 471
Wheeling, West Virginia 26003

On behalf of the Office of the Comptroller of the Currency and of the defendants in the above-entitled actions in their official capacities, I enclose herewith for filing in these cases the originals and two copies of: (a) Opposition to Plaintiffs' Motions to Dismiss, and (b) Memorandum in Opposition to Motion to Dismiss Without Prejudice, and the Appendices thereto.

Thank you for your cooperation.

Sincerely,


L. Robert Griffin
Attorney, Litigation Division

Enclosure

OPPOSITION TO PLAINTIFFS' MOTIONS TO DISMISS

Defendants, in their official capacities, by their undersigned attorneys, oppose Plaintiffs' motions, pursuant to Rule 41(a)(2) F.R.Civ.P., to dismiss these actions without prejudice, and to retain jurisdiction over Plaintiffs' pending motions for awards of attorneys' fees, on the grounds that:

1. If these actions are dismissed at this stage of the proceedings, they ought to be dismissed only with prejudice because:

a) Dismissal of these actions without prejudice would be inimical to the public interest, since the actions were planned and used as methods of harassment to interfere with the normal, uniform system of bank regulation. Dismissal without prejudice would interfere with,

and invite further interference with, the lawful and essential system of regulation of national banks.

b) The likelihood of duplicative subsequent litigation requires dismissal only with prejudice.

c) The advanced stage of these proceedings and Defendants' effort and expense in preparation for trial require that dismissal be only with prejudice.

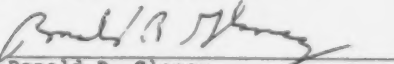
d) Plaintiffs have failed to establish the necessity of dismissing these actions without prejudice.

2. Plaintiffs cannot prevail in their motions for an award of attorneys' fees; the instant motions demonstrate even further the meritlessness of Plaintiffs' position.

In support of this opposition to Plaintiffs' motions, Defendants respectfully refer the Court to the Memorandum and Appendices filed herewith.

Respectfully submitted,

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MEMORANDUM IN OPPOSITION TO
MOTION TO DISMISS WITHOUT PREJUDICE

INTRODUCTION

Defendants in the above-captioned actions, acting in their official capacities ["Defendants"], submit this Memorandum in opposition to Plaintiffs' motions to dismiss each action without prejudice and to retain jurisdiction to rule on Plaintiffs' motions for attorneys' fees.

Since the two motions are substantially identical, they will be hereinafter collectively referred to as the "Motion" and this Memorandum will be Defendants' consolidated response to each such motion.

Defendants oppose the Motion on the ground that if Plaintiffs are allowed to abandon these actions at this stage of the litigation, dismissal must be with prejudice.

Defendants do not, by opposing Plaintiffs' motion and urging dismissal with prejudice, abandon their position, both in this Court and on a pending appeal, that this Court lacked jurisdiction under 12 U.S.C. §1818(c)(2) to do more than lift the temporary cease and desist orders and that, when the Comptroller withdrew these orders prior to the hearing, the Court had nothing more before it as to the Defendants in their official capacities.

DISCOVERY TO DATE

Prior to the hearing on the motions for preliminary relief, the Office of the Comptroller of the Currency ("OCC"), produced, pursuant to Court Order, approximately 10,000 pages of documents for inspection by Plaintiffs. In October 1981, approximately 300-400 additional pages of more recent documents were produced. In addition, prior to the hearing on preliminary relief, depositions of the following ^{and} OCC personnel were taken:

[REDACTED]

two additional
In December, 1980, OCC officials

[REDACTED] were deposed, and Defendants deposed the following:
6 individuals.

Defendants have served interrogatories and a document request upon the non-banking plaintiffs and upon [REDACTED]. The latter discovery requests have not been responded to and the former have been objected to in their entirety.

1. THE ACTIONS SHOULD BE DISMISSED ONLY WITH PREJUDICE

- A. Dismissal Of These Actions Without Prejudice
 Would Be Inimical To The Public Interest Since
 The Actions Were Planned And Used As Methods
 Of Harassment To Interfere With The Normal,
Uniform System Of Bank Regulation

As will be demonstrated below, largely from Plaintiffs' own evidence, the instant actions were planned, well before the events which Plaintiffs now state triggered their filing, as a means of fending-off OCC criticism of (and potential regulatory action against) banking practices which Plaintiffs knew well were irregular and likely to produce regulatory concern. The actions - which allege abusive and malicious conduct on the part of the government and seek damage awards against OCC personnel for violations of constitutional rights - have in fact been used in attempts to influence OCC examiners and officials in the exercise of their statutory responsibilities. Thus, dismissal of the actions without prejudice would have the effects, contrary to the public interest, of: (a) allowing Plaintiffs to continue to use the threat of litigation in an attempt to influence OCC examiners and officials, without the necessity of submitting to further discovery (which has already yielded strong indications that Plaintiffs' claims are meritless) and impartial judgment; and (b) inviting other disgruntled regulatees to circumvent the exclusive regulatory and judicial review procedures by bringing reckless ad hominem charges which can be conveniently dropped when the evidence fails to support them, without abandoning the harassment implicit in litigation or its threat.

On the day of his deposition in these actions, [REDACTED]
 [REDACTED] - produced,
 pursuant to subpoena, certain documents, two of which were subsequently marked DX 60 and DX 74. This was the first time Defendants had known of such documents, and thus this Motion presents the OCC's first opportunity to make these documents

known to the Court. [REDACTED] testified that he was given these documents by bank personnel while in [REDACTED] for the the April 23, 1981 meeting^{2/} of the Board of Directors of the four [REDACTED] banks with the OCC Regional Office. [Appendix A].^{3/} DX 60 [Appendix B], and DX 75 [Appendix C]^{4/} demonstrate beyond cavil that Plaintiffs fully anticipated criticism and regulatory action directed to their highly unusual banking practices, and, apparently determining that the best defense is a good offense, planned to bring legal action impugning the competence and motives of OCC personnel as a means of defusing OCC criticism. Both documents dwell to a great extent upon Plaintiffs' banking practices which subsequently have required regulatory action, and upon the undesirability of regulatory interference with the practices so espoused. Thus the papers set forth in significant detail Plaintiffs' justification, strategy and tactics for blocking OCC criticism of, and/or action against, the questionable practices discussed.

The core of Plaintiffs' planned banking practices is lending to "undercapitalized" customers, which practice necessarily involves the banks in a continuous foreclosure, repossession and

2/ As a result of concurrent examinations as of year-end 1980, it was determined that administrative action was necessary with regard to all four [REDACTED] banks. The OCC made this determination as to [REDACTED] which are national banks, and the Federal Reserve Board made it as to [REDACTED] which is a state member bank. On April 23, 1981, the boards of directors of all four banks met with their respective regulators at the OCC Regional Office in Richmond, where notices of charges were served and, as to the three national banks, limited temporary cease and desist orders were imposed. As will be noted hereinafter, Plaintiffs' representatives testified that it was this meeting that inspired the instant lawsuits.

3/ Appendices A, E, F, G, H, I, J, M and N hereto consist of portions of transcripts of depositions taken in these proceedings.

4/ DX 60 purports to consist of plans in outline form for three "white papers" examining past performance and future management goals and objectives. It lists areas to be examined, usually in language graphically telegraphing the conclusion intended to be reached. DX 75 purports to be an initial draft of one of these "white papers". No author is identified in the documents themselves, but [REDACTED] signature is on the letters transmitting each. Neither document specifies the bank or banks to which it applies, and [REDACTED] has testified he believes DX 75 applies to [REDACTED]. However, the references to "all banks" and "each bank" on the first page of DX 60, together with the nature of the discussion in both documents, indicates strongly that the documents were drafted for use by all four [REDACTED] banks.

restructuring method of operation [Appendix B, p.6, ¶21; p.11, ¶11; Appendix C, p.8, ¶15].^{5/} Rejection of the concept of operating like "most banks" is explicit and forceful. [Appendix B, p.6, ¶21; p. 11, ¶11; p. 12, ¶12; Appendix C, p.5, ¶8].

Also central to Plaintiffs' concept is participation of substandard and classified credit among the four banks. [Appendix B, p.5, ¶18; p.8, ¶27; p.11, ¶7; p.12, ¶16].

Not only do Plaintiffs express vigorous disagreement with the OCC's standards for classifying assets [Appendix B, p.2, ¶1.A.; p.4, ¶'s 12, 13; p.7, ¶26; p.8, ¶28; p.13, ¶'s 1.A., 1.D.; Appendix D, p.6, ¶16],^{6/} they also evidence a condescending attitude toward bank examiners and a reluctance to accept regulation [Appendix B, p.5, ¶'s 16, 18; p.11, ¶5; p.13, ¶1.B.; Appendix C, p.2, ¶9e; p.6, ¶'s 10, 11; p.9, ¶19c].

Fully consistent with this line of thinking is [REDACTED] vigorous assertion that the Comptroller has absolutely no business criticizing the salary paid a bank official [Appendix E].

Three crucial facts must be noted about the criticisms and innuendos against the examiners and the OCC contained in Appendices B and C. First, they relate solely, not to particular actions, attitudes or policies directed exclusively to [REDACTED] or any of the Plaintiffs, but rather to the normal regulatory posture of the OCC. In glowing detail, these documents show Plaintiffs' acute awareness that their preferred methods of operation do not square with the regulatory requirements and policies uniformly enforced by the OCC. [REDACTED] came close to admitting this upon his deposition [Appendix F]. Along the same lines, he testified:

Q. Well, are you saying then that, in fact, this was not a conspiracy, or is it your testimony that there is a conspiracy directed against yourself, [REDACTED]

A. [REDACTED] I don't care what you call it. I think it was more than due diligence in the exercise of their judgment and the exercise of their administrating, criticizing the loans of the banks.

^{5/} The pages of Appendix B are not numbered; references to its page numbers herein are to the order in which the pages actually appear in the Appendix.

^{6/} Appendix D is the Affidavit of [REDACTED], sworn to October 4, 1981 and previously filed with this Court, detailing, inter alia, certain occurrences during a September, 1981 loan review meeting at [REDACTED] between OCC examiners and bank representatives.

Q. Now --

A. I won't say that it is a conspiracy. All I can say is that they were very much overly critical. Why, I don't know.

[Appendix G]

[REDACTED] testimony acknowledges that Plaintiffs' difficulty with the OCC resulted from, not unusual treatment of Plaintiffs by the OCC, but rather from OCC's response, required by its public responsibilities, to the unusual practices of Plaintiffs.

Secondly, there is nothing wrong per se with attempting unusual modes of banking or criticizing and opposing regulatory authority. It cannot be emphasized too strongly that the OCC has no power to require a bank to adopt or abandon a banking practice except pursuant to the cease and desist procedure itself, complete with full scale judicial review. All regulated banks and persons may rightfully - as plaintiff banks have done - challenge any OCC directive or requirement and obtain - as plaintiff banks will - an impartial determination on the merits. This did not and does not satisfy Plaintiffs, however; rather, they brought actions with allegations impugning the personal and professional characters of OCC officials and examiners.

Thirdly - and most importantly for the instant Motion - Appendices B and C demonstrate that litigation against the OCC and its personnel, including personal liability actions, was planned as a means of defusing expected OCC criticism and regulatory action. Now Plaintiffs would have us believe that the instant actions were contemplated only after Plaintiffs witnessed or discovered certain facts which allegedly indicated unusual mistreatment of Plaintiffs. Thus, three representatives of Plaintiffs - [REDACTED] testified unequivocally that it was the April 23, 1981 meeting that motivated Plaintiffs to bring suit. [Appendices H, I, and J].

The truth, however, is demonstrated by Appendices B and C, which had to be prepared well before the [REDACTED] meeting, since they were handed to at least [REDACTED] while he was in Richmond for that meeting. Nor does it lie in Plaintiffs'

mouths to contend that Appendices B and C were prepared in anticipation of any regulatory action by the OCC. Indeed, much of Plaintiffs' ire is directed at the alleged fact that the serving of the cease and desist orders on April 23, 1981 took them completely by surprise. And, in proceedings before this Court on Plaintiffs' motion for preliminary relief, [REDACTED] testified:

Q. You expected to discuss the bank examination report in [REDACTED] with them on April 23rd?

A. That's what the letters that we received said. Although [REDACTED] had indicated to me that maybe they didn't want to discuss any specifics, I told some of our directors on the phone the week before I felt sure would. I would try to help keep us from getting too far off track of whatever they wanted to discuss. The directors did want to discuss things, and he indicated to me that there would be candor in discussion.

Q. Were you aware when you went to Richmond that you would be handed a cease and desist order?

A. No, sir.

[Appendix K] 7/

*

*

*

Q. And capital.

Let me go back to this meeting in Richmond with the board of directors. You stated yesterday that you didn't have any idea what was going to happen at that meeting, those meetings, is that correct?

A. Well, I certainly didn't expect to occur what occurred. In fact, I bet you it wasn't a week before that I had a conversation with the Deputy Regional Administrator who was talking very friendly about how we needed to get the bank examiners out of the bank every six months.

[Appendix L; emphasis added]

In short, these documents show clearly the pre-existing plan to challenge the normal regulatory operations of the OCC. As will be demonstrated directly below, they also evidence Plaintiffs' decision to mount this challenge by means of harassing lawsuits.

First, the documents show an ardent interest in examining the legal extent of the Comptroller's authority. For example, the proposed purpose of one of the contemplated "white papers" is said to be:

To evaluate and establish the legality of certain practices of the Comptroller of the Currency and certain practices of the bank, and assess the alternatives available to the bank

7/ Appendices K and L are portions of the transcript of the proceedings before this Court on Plaintiffs' motion for preliminary relief.

directors to direct the bank along a course of action that they deem appropriate.

[Appendix B, p. 13]

Similarly, one of the projects for this paper is to:

Assess the legality of whether the utilization of subjective standards goes beyond the scope of the law and authority of the Comptroller of the Currency; determine if examiners are required to take into account the general state of the economy, both nationally, state-wide and locally, and the cyclical changes in economy, particularly in West Virginia where it is associated with coal.

[Appendix B, p. 14, ¶I]

And again, Plaintiffs expressed their intent to:

Review the extent and scope under the law that examiners may direct management.

[Appendix B, p. 14, ¶L].

Nor is Plaintiffs' ambitious project limited to discovering applicable legal standards; aggressive action is clearly contemplated:

Review legal alternatives to bank if Board determines that the examiner's standards discriminate against small businesses and this is reinforcement of violation of the "Community Reinvestment Act". Investigate and pursue this possibility.

[Appendix B, p. 14, ¶H; emphasis added].

* * *

Determine alternatives available to bank directors and management in complying with or not complying with regulatory authority demands.

[Appendix B, p. 14, ¶J].

Finally, and most significantly, a direct and personal attack upon OCC examiners and officials is contemplated:

Determine the personal liability of examiners and regulatory authorities for their negligence in reinforcing management and directors to do things that are not in the best interests of the bank. Determine how directors can go about insuring banking examiners meet the same standards of care that the directors must incur.

[Appendix B, p. 14, ¶M; emphasis added].

Appendix C makes the point again:

Bank regulatory authorities are of primary importance to providing critical input. However, bank regulatory examination personnel must be held to equivalent standards of accountability for their reinforcement of courses of action as management and directors are for their stewardship regardless of the legal protections perhaps available to them for their omissions and negligences....

[Appendix C, p. 6, ¶10] (emphasis added).

██████████ who testified that the approach contained in DX-75 goes back to 1979 and perhaps earlier [Appendix M], attempted, totally without success, to avoid the inescapable conclusion that the paragraph last quoted above indicates a pre-existing determination to bring suit against the regulators:

Q. The second sentence, this says, "however, bank regulatory examination personnel must be held to equivalent standards of accountability for their reinforcement and [sic] courses of action as management and Directors are for their stewardship, regardless of the legal protections perhaps available to them for their omissions and negligences."

A. Pretty good sentence.

Q. Yes, it is. My question to you is, how were they going to be held to these standards?

A. Well, you have seen the results right here.

Q. Are you saying that at that time you were considering possible legal action?

A. No, I think people should be held accountable for their standards. I think everybody should be. I am held accountable for everything I do.

Q. Short of legal action, though, how would you hold them accountable?

A. As far as I know, no other way.

Q. This was referring to legal action?

A. No, when this was written, I am sure that was the last thing in our minds.

Q. Maybe the next to the last thing in your mind?

A. No. I am sure we never considered that, until -- I never considered it, certainly, and I doubt if ██████████ ever did, until he was forced to, because what the Comptroller's Office was doing to him would break him.

[Appendix N; emphasis added]

Thus, the allegations of conspiracy and abuse of governmental power which Plaintiffs have fabricated from whole cloth serve merely as post hoc justification for litigation planned well in advance as a means of intimidating the OCC into abandoning its statutory responsibility with regard to Plaintiffs' practices. In this regard it is significant that the preliminary relief sought herein included a halting of the administrative hearings on the cease and desist proceedings, which hearings are specifically provided by statute to give Plaintiffs an opportunity to contest, on the merits, the Comptroller's allegations. Similarly, by the

instant motion, Plaintiffs seek to use the ploy of dismissal without prejudice as a tool for avoiding trial on the merits of their baseless allegations, while keeping the threat of a lawsuit alive as a means of attempting to intimidate the OCC.

Nor is anticipation of attempted intimidation of OCC personnel mere speculation. Indeed, Plaintiffs' likely use of the threat of litigation in the future is demonstrated by their heavy-handed use of it in the past. As explained in detail by the affidavit of examiner [REDACTED] filed previously with this Court [Appendix D], plaintiff [REDACTED] and his representatives have heretofore sought blatantly to influence examiners' determinations with threatening and intimidating references. Specifically, at the loan review meeting held in connection with an examination of [REDACTED]

On several occasions, [REDACTED] stated that the bank's capital would be increased by virtue of several suits he had pending and expected to win. [REDACTED] had a \$10,000 loan outstanding at the time of the examination. I asked him what the purpose and source of repayment were. He responded by saying the funds were used for personal expenses and that funds for repayment would come from dividends, interest and lawsuits. His constant reference to lawsuits was, in my opinion, meant to intimidate the examiners. On the second day of the loan discussion, [REDACTED] attempted to move the meeting from a spacious board room to his small office. His reason was that he wanted to be near his conference telephone system because he might have to talk to his attorney. [REDACTED]

* * *

[REDACTED] then stated that certain people employed by the Office of the Comptroller of the Currency were not aware of [REDACTED] constitutional rights and that two or three people were going to pay very dearly for persecuting [REDACTED]. All the while, he was tapping his index finger on the table in front of him and presenting a rather stern countenance. He spoke rather excitedly for a few minutes about how the people employed by the Comptroller's Office were not going to get away with what was going on and how certain people would be taught a lesson.

[Appendix D, pp. 6-7]

Also, Plaintiffs cite withdrawal of a demand for an immediate capital increase at [REDACTED] as a prime factor influencing the filing of the instant Motion. [Motion, ¶s 2, 3]. This in itself is tantamount to an admission that these actions are brought, not to gain adjudication on the merits for the benefit of plaintiff

banks, but rather to influence regulatory policy for the benefit of [REDACTED] via threat of litigation, since determination of the merits of this suit will and can have no effect on the regulation of [REDACTED] a non-party.

Finally, the very filing of this Motion demonstrates that the instant actions are brought for the purpose of harassment rather than for determination on the merits. The wide disparity between the grievances alleged in the complaints and upon deposition testimony on the one hand, and the factors allegedly influencing Plaintiffs' decision to drop the suit on the other, make unmistakably clear that Plaintiffs did not intend their allegations ever to be subject to the scrutiny of a full scale trial and adjudication.

In summary, Plaintiffs adopted a pattern of banking contrary to that of "most banks", large and small, state or national. In doing so, they knowingly and wilfully acted contrary to established banking practice and clearly understood they were stepping outside the bounds of prudent banking as it is viewed by the OCC and as it is apparently viewed by the management of most banks. Having pre-determined their practices to be contrary to the rules, regulations, and procedures of the OCC, Plaintiffs devised a scheme to counteract and intimidate the employees of the OCC and thus divert their attention from their statutory responsibility. Apparently, these tactics were felt necessary because of Plaintiffs' evaluation of their position and showed they knew they were unlikely to prevail in the forum provided by statute for review of such matters. Thus, having chosen to deliberately invite the criticism and concern of the regulator, they then turn around and allege a conspiracy to abuse governmental power and constitutional rights as soon as the regulator reacts exactly as anticipated to practices the Plaintiffs knew were in non-conformance with the standards of safety and soundness. To condone these tactics by dismissal without prejudice is to declare an open season on bank examiners.

Whatever the outcome of this litigation - including whether or not it is finally determined by order or merely "left hanging"

by dismissal without prejudice - Defendants retain the legal and professional responsibility of examining and supervising national banks, including those involved here. This regulatory process is, beyond doubt, crucial to the security of depositors and the public. It would be inequitable and inimical to the public interest to allow Plaintiffs to file suit in an effort to interfere with this supervision, discontinue the action after Defendants have expended extensive time and resources preparing their defense and before Defendants have had a chance to be vindicated, and then re-institute the same litigation in a further attempt to prevent Defendants from performing their official functions. Such a course would invite not only Plaintiffs but others as well to fabricate specious charges as means of evading regulatory supervision and judicial review.

In awarding attorneys fees to governmental defendants sued in both their official and individual capacities (and sued in bad faith), a recent decision states:

"Having studied the briefs and law therein cited, the Court can perceive no reason why government officials should be harassed by bad faith litigation at no risk to the plaintiff. The meritless nature of such a suit makes manifest that plaintiff's purpose was not to obtain a judgment but was merely to vex and harass or to obtain publicity. If a plaintiff can accomplish this at no risk to himself, then there is no restraint upon a person of bad faith who may drain the energy, attention, and will of government officials at little or no cost to himself, but at great expense and loss to the body politic."

Moon v. Smith, 523 F.Supp. 1332 (E.D.Va. 1981).

Even though, as demonstrated above, Plaintiffs' purpose was to "vex and harass", Defendants, in their official capacities, do not wish to penalize Plaintiffs beyond the final laying to rest of these actions which Plaintiffs have indicated an unwillingness and/or an inability to pursue. Without such relief, Plaintiffs will continue to "drain the energy, attention, and will of government", at no cost or risk to themselves, but at great loss to the public good.

B. The Likelihood Of Duplicative Subsequent Litigation Requires Dismissal Only With Prejudice

The likelihood of reinstitution of litigation on substantially the same allegations proffered in the actions sought to be dis-

missed is a significant factor militating in favor of dismissal with prejudice. As the Court of Appeals for this Circuit has written:

The prejudice to the defendant which justifies the court in refusing permission to plaintiff to dismiss is more carefully considered, and it is no longer true to say, as was so often said in decisions preceding the Federal Rules, that "the incidental annoyance of a second litigation upon the subject matter" furnishes no ground for denying the plaintiff permission to dismiss his complaint.

Piedmont Interstate Fair Ass'n v. Bean, 209 F.2d 942, 946 (4th Cir. 1954). See also, Thomas v. Amerada Hess Corp., 393 F.Supp. 58, 70 [M.D.PA. 1975].

In the instant case, the likelihood of subsequent and duplicative litigation is shown by the Motion itself. Specifically, Plaintiffs cite as a significant factor in their decision to seek dismissal the negotiation of a "mutually satisfactory method and timetable for capital increases" in [REDACTED] [Motion, ¶3]. There has been no resolution of the capital issue with regard to [REDACTED]. That issue itself may have to be resolved through other administrative action. Since Plaintiffs acknowledge that the instant litigation is brought, at least in part, for the purpose of influencing the OCC with regard to [REDACTED] final failure of resolution of this issue could well lead to reinstatement of these actions.

Moreover, Plaintiffs' papers demonstrate no inclination to back-away either from their unsafe and unsound banking practices, or from their proclivity for alleging corrupt and conspiratorial motives on the part of any regulator with the audacity to challenge those practices. Rather, Plaintiffs apparently are motivated in their willingness to dismiss by a belief that the OCC's regulatory posture will be more agreeable to their practices. Assuming Plaintiffs are sincere in this position, the continuous application of uniform regulatory policy to plaintiff banks - as was done in the past and as is made inevitable in the future by OCC's responsibilities and its determination to fulfill them - will in all likelihood result in reinstitution of the litigation on the basis of the same allegations set forth in the complaints herein.

Reinstitution of this litigation at a later time would substantially prejudice Defendants. It would make necessary the repetition of much preparation already accomplished, so that after a lapse of time Defendants and their attorneys could be brought once again "up to speed". Also, passage of time could well dull memories of factual matters helpful to Defendants. Finally, as more fully described under A, supra, reinstitution of the litigation could - and most likely would - be used by Plaintiffs to harass and intimidate Defendants in the pursuit of their duties.

Thus, the substantial likelihood of the reinstitution of this litigation at a later time, together with the prejudice such reinstitution would visit upon Defendants, requires dismissal of the actions only with prejudice.

C. The Advanced Stage Of These Proceedings And Defendants' Effort And Expense In Preparation For Trial Require That Dismissal Be Only With Prejudice.

The instant Motion was filed after more than eight months of complex and extensive pretrial proceedings. The Fourth Circuit, on several occasions, has expressly held that "the advanced stage of the proceedings" warrants the denial of a plaintiff's voluntary motion to dismiss without prejudice. Paturzo v. Home Life Insurance Co., 503 F.2d 333, 335 (4th Cir. 1974); Armstrong v. Frostie Co., 453 F.2d at 914, 916 (4th Cir. 1971).

Defendants' preparation for trial in this action has been costly in terms of time, effort, and money. Defendants' preparation has included answering the complaints; voluminous document productions, preceded by extensive searches for the documents responsive to Plaintiffs' request; testifying at depositions; preparation for and taking of six depositions; preparation and service of notices of subpoenas for a large number of further depositions, which are currently postponed due to the pending Motion; propounding of two sets of interrogatories and document requests; defense against Plaintiffs' motion for preliminary relief; preparation and argument of a motion to stay the preliminary injunction; preparation and argument of an appeal from the preliminary injunction. To permit

Plaintiffs to dismiss their actions without prejudice and thus be able to reinstate them at will would render useless Defendants' extensive preparations in defense of this proceeding.

By way of contrast to the advanced stage of the instant proceeding which mandates the dismissal of the actions with prejudice, see, e.g., Moore v. Davis, 72 F.R.D. 96 (M.D.N.C. 1976) in which the court properly granted plaintiff's motion to dismiss without prejudice because the action "ha[d] not progressed very far." The Court noted:

"No answer or motion for summary judgment has been filed, ... and there is no indication that discovery has commenced. Thus; it is doubtful that the defendants would suffer prejudice from the granting of a Rule 41(a)(2) motion."

72 F.R.D. at 97.

Similarly, the Court in Meltzer v. National Airlines, Inc., 31 F.R.D. 47 (E.D.Pa. 1962) approved plaintiff's motion to dismiss without prejudice noting that:

... "this matter has not gone beyond the pleading stage. Plaintiffs state that defendant has initiated no discovery, and nothing to the contrary appears."

31 F.R.D. at 49.

In sum, the "advanced stage of these proceedings," and the extensive effort and expense expended by Defendants in responding to discovery requests, in preparation for discovery and in preparation for trial, necessitate the dismissal of the actions with prejudice. This result comports with precedent and fulfills Rule 41(a)(2)'s purpose of preventing voluntary dismissal which unfairly affects the other side.

D. Plaintiffs Have Failed To Establish The Necessity Of Dismissing This Action Without Prejudice.

Plaintiffs attempt to support the necessity of granting their dismissal motion without prejudice with the groundless assertion that "much of the relief sought by plaintiffs appears to have been achieved." This meritless assertion constitutes an "insufficient explanation for the need to take a dismissal." Plaintiffs' Motion to dismiss must therefore be granted only with prejudice, Pace v. Southern Express Co., 409 F.2d 331, 334 (7th Cir. 1969); Thomas v. Amerada Hess Corp., supra, 393 F.Supp. at 70.

In furtherance of their attempt to fabricate a basis for dismissing this action without prejudice, Plaintiffs mischaracterize this proceeding as a simple action to set aside a temporary cease and desist order and to challenge the objectivity and reasonableness of Defendants' supervisory actions. Apparently, Plaintiffs wish to forget that they have alleged a wide-ranging conspiracy involving both tortious and criminal conduct encompassing all levels of the Comptroller's Office and that they have in fact sued numerous OCC employees in both their official and individual capacities for damages of not less than \$250,000. Nevertheless, rather than proceed with this action and attempt to establish their baseless allegations against Defendants at trial, Plaintiffs have unilaterally claimed victory and sought dismissal without prejudice.

Plaintiffs base their protestations of victory and Motion to dismiss on two grounds: (1) the Comptroller withdrew the temporary cease and desist orders on June 15, 1981;^{8/} and (2) this lawsuit has enabled the [REDACTED] to negotiate with the OCC a mutually satisfactory method and timetable for capital increases.^{9/} Neither ground merits dismissal without prejudice. Indeed, Plaintiffs' reliance on these grounds demonstrates that for at least six months these actions have been pursued in bad faith.

As to withdrawal of the temporary orders, reliance on this fact cannot be squared with the continuation of the actions after the withdrawal of those orders. Plaintiffs insisted on going forward with the case because, they asserted, they had not received sufficiently protective or permanent relief from the withdrawal of the temporary orders and the controversy over them therefore, accord-

8/ In view of Plaintiffs' assertion that they effectively prevailed on June 15, 1981, it must be concluded that their continuation of this lawsuit for the ensuing six months was an exercise in bad faith.

9/ Plaintiffs' protestations of success are all the more puzzling in view of the fact that the District Court expressly denied several of Plaintiffs' claims including: (1) their prayer for a temporary restraining order staying all administrative proceedings; (2) an injunction prohibiting Defendants from relying or acting upon any definition of a "substandard" loan; (3) an injunction enforcing the Defendants' alleged agreement and understanding with [REDACTED] approving his salary, dividend and methods of operating the four banks under his control; and (4) a declaratory judgment that the bank is not in violation of Sections 22(g) and (h) of the Federal Reserve Act and regulations promulgated thereunder.

ing to Plaintiffs, was not moot. In fact, Plaintiffs filed one of their amended complaints seeking damages of not less than \$250,000, against Defendants in their personal capacities, on June 15, 1981, the very day the Comptroller withdrew the temporary orders.

Plaintiffs also claim victory and thus request dismissal without prejudice on the grounds that these actions have allegedly enabled [REDACTED] to negotiate with the OCC a mutually satisfactory method and timetable for capital increases. This assertion is not only incorrect, it defies logic. No settlement has been reached on the issue of [REDACTED] need for additional capital, and there is no assurance that a mutually acceptable plan will ever be found. Moreover, [REDACTED] is not now, nor has it ever been, a party to these proceedings. Plaintiffs' assertions with respect to [REDACTED] rather than supporting their attempt to dismiss without prejudice, establish that they commenced and prosecuted these actions in bad faith. Plaintiffs' own admission indicates that they brought these actions not to vindicate their own rights but, rather, to vex, harass, and distract the OCC in an attempt to achieve a satisfactory settlement in a matter not at issue in this proceeding, i.e., the inadequacy of [REDACTED] capital structure.

In conclusion, neither the Comptroller's withdrawal of the temporary cease and desist orders nor Plaintiffs' allegations with respect to [REDACTED] a non-party to this proceeding, establishes in even the most remote fashion the necessity of dismissing these actions without prejudice. Thus, the need to finally resolve the litigation through dismissal with prejudice is clear.

E. Alternatively, Dismissal Without Prejudice
Requires That Defendants Be Compensated For
Their Costs And Attorneys' Fees Expended
In Defending This Action.

For the reasons set forth above, these actions should be dismissed only with prejudice. However, in the event that Plaintiffs' Motion to dismiss without prejudice is granted, equity requires that Plaintiffs be directed to pay to Defendants the costs and attorneys' fees incurred by the latter to date in these actions.

As noted above, Rule 41(a)(2) provides that "an action shall

not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This clause is intended to "protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal. Attorneys' fees and costs are commonly awarded as one such 'term and condition' for a voluntary dismissal, for these costs were undertaken unnecessarily in such a case." GAF Corp. v. Transamerica Insurance Co., 32 F.R. Serv. 2d 703, 707, ____ F.2d ____ (D.C.Cir. 1981) [footnotes omitted]. See, e.g., LeCompte v. Mr. Chip Inc., 528 F.2d 601, 603 (5th Cir. 1976): "most cases under the Rule have involved conditions that require payment of cost and attorney's fees." See also Yoffe v. Keller Indus., Inc., 580 F.2d 126 (5th Cir. 1978), reh. den., 582 F.2d 982 (5th Cir. 1978); cert. den., 440 U.S. 915 (1979); 5 Moore's Federal Practice ¶41.05[1] n.7 and cases cited therein: "After answer is served and defendant has incurred considerable expense in preparing for trial, dismissal without prejudice is a question of equities and is usually not allowed by the court except on condition that plaintiff pay defendant his reasonable costs and attorneys' fees in a stated amount within a fixed time." Furthermore, costs are not limited to taxable costs "but may include compensation for all the expenses to which the defendant has been put including attorney fees as well as other costs and disbursements." Eaddy v. Little, 234 F.Supp 377, 380 (E.D.S.C. 1964) [citations omitted].

The Fourth Circuit's rationale that a plaintiff "put his money where his mouth is" is directly applicable to the instant Motion. Evans v. Croom, 650 F.2d 521, 525 (4th Cir. 1981). If Defendants are not permitted to recover their attorneys' fees and costs, Plaintiffs "will have every incentive to indulge any inclination they may have to harass" federal officials for they will have nothing to lose and everything to gain. Id. at 523.

In sum, both the express terms of Rule 41(a)(2) and Plaintiffs' bad faith in commencing and prosecuting these baseless and harassing actions mandate that Defendants be awarded their fees and costs.

II THE COURT SHOULD NOT RETAIN JURISDICTION TO
RULE ON PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Plaintiffs, by their motion seeking an order dismissing the actions without prejudice, also ask the Court to retain jurisdiction to rule on their motions for attorneys' fees and costs currently pending before the Court.

For the reasons specified in Defendants' Opposition to Plaintiffs' Motions for Attorneys' Fees and Expenses, and Memorandum in support thereof, to which the Court is respectfully referred, Plaintiffs are now even less entitled to an award of attorneys' fees and costs than they had been when that motion was originally filed.

Plaintiffs seek reimbursement for attorneys' fees and costs incurred in connection with their efforts to obtain a preliminary injunction in June, 1981. ^{10/} However, the Equal Access to Justice Act, upon which Plaintiffs rely in seeking attorneys' fees, is not applicable to fees and expenses incurred prior to October 1, 1981. Even assuming, arguendo, that the Act were retroactively applicable to fees and expenses incurred prior to that date, and thus available to Plaintiffs, Plaintiffs would still not meet the several independent legal criteria for an award of fees under that Act, or for that matter the other authorities Plaintiffs invoked in their motion; Plaintiffs are not "a prevailing party" as that term is used in the Act; Defendants' position is "substantially justified"; and an award to Plaintiffs would be unjust in light of the indiscriminate filing of actions against government employees in their individual capacities and of the fact that Plaintiffs instituted these actions after their failure to live up to commitments made to the Comptroller's Office.

By the instant Motion, Plaintiffs have failed to state a single argument why the Court should exercise jurisdiction simultaneously to rule on the pending motions for attorneys' fees. Plaintiffs' only reference to the Equal Access to Justice Act in

^{10/} Defendants had originally asked the Court to defer any ruling on these motions until after the Fourth Circuit had ruled on Defendants' interlocutory appeal from the Court's preliminary injunction order. Memorandum in Support, p.2.

the Motion is made in the context of the ongoing administrative proceedings (Motion, ¶4). Plaintiffs fail to address the fact that the Fourth Circuit is expected to rule on the interlocutory appeal from the preliminary injunction. This fact militates against the Court retaining jurisdiction to rule on these claims. Should the Court of Appeals rule in the Comptroller's favor, the Comptroller would be the prevailing party on that issue and not Plaintiffs. Assuming, arguendo, the validity of Plaintiffs' Equal Access to Justice Act claim, any award of attorneys' fees to Plaintiffs in such circumstances would be most improper prior to any Fourth Circuit ruling.

Even on the merits of the pending motions for attorneys' fees, Plaintiffs have failed to add any new arguments in their favor. Yet, in contrast, Plaintiffs' own "white papers" (discussed supra) and other discovery make Plaintiffs' legal and equitable positions appear even weaker than before.

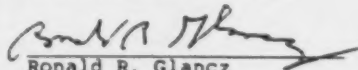
Accordingly, the Court should not exercise jurisdiction to rule on Plaintiffs' pending motion for attorneys' fees. However, should the Court decide to rule on this motion, it should deny the relief requested.

CONCLUSION

For the reasons stated above, the Motion should be denied and, if Plaintiffs wish to dismiss the instant actions, this should be allowed only on condition that dismissal be with prejudice. Alternatively, Plaintiffs should be directed to pay Defendants' costs and attorneys' fees incurred to date. The Court should not retain jurisdiction to rule on Plaintiffs' Motions for attorneys' fees.

Respectfully submitted,

JOHN M. MILLER
Acting Chief Counsel


Ronald R. Glancz
L. Robert Griffin
Donald N. Lamson
Howard N. Cayne

Attorneys for Defendants
Office of the Comptroller
of the Currency

DEFENDANTS' RESPONSE TO PLAINTIFFS' REPLY MEMORANDUM

Pursuant to permission granted by the Court in its Order dated February 25, 1982, defendants, in their official capacities, herewith submit a short rebuttal to new material contained in the reply memorandum ("Reply") filed by plaintiffs in support of their motion to dismiss the instant actions without prejudice.

1. Defendants Have The Right To Oppose
The Instant Motions.

Plaintiffs urge that, since they have offered dismissal without prejudice, defendants may not continue the actions at public expense. (Reply at 12-16). Although plaintiffs do not distinguish between the official and the individual capacities of defendants, the arguments advanced in support of this position relate only to defendants in their individual capacities. Indeed, the only substantive argument advanced on this score is that defendants may not "use counsel employed for them in this case at public expense" for the purpose of laying the basis for subsequent malicious prosecution claims (Reply at 14).^{1/} Plaintiffs' argument does not support their position and their position is fatally flawed.

First, even assuming arguendo (and falsely) that defendants in their individual capacities may not oppose dismissal without prejudice, the Office of the Comptroller of the Currency ("OCC") clearly may seek, as the Court may order, the condition that dismissal, if any, be with prejudice. Counsel for the OCC (and defendants in their official capacities) represents only the public interest and has opposed dismissal without prejudice for the numerous reasons set forth in the OCC's initial memorandum opposing dismissal without prejudice ("Memorandum"), which reasons

^{1/} Plaintiffs also raise the argument that provision of outside Counsel for the defendants in their individual capacities has been accomplished improperly. This is pure smokescreen. It has absolutely no relevance to the argument that the defendants in their individual capacities may not oppose dismissal without prejudice. The latter argument goes to public funding of the defendants' defense; public funding is no more or less present when outside counsel are employed than when the Department of Justice conducts the defense itself. The Court need not address the outside counsel issue because plaintiffs cannot conceivably have standing to raise it, the point is totally without merit, and plaintiffs do not now request the Court to interfere with the funding of the defense.

do not include potential tort suits by the individual defendants. Government counsel has the right and responsibility to determine and pursue the government's interest in this action without dictation from the plaintiffs.

Moreover, opposition to the instant motions by the individual defendants is quite clearly in the government's interest. As demonstrated in the Memorandum, plaintiffs have used in the past, and, if these actions are dismissed without prejudice, undoubtedly will use in the future, the threat of continued litigation to hamper OCC in fulfillment of regulatory tasks. Also, if malicious prosecution suits are successfully brought, presumably one crucial element of damages would be litigation expenses which would be repayable in that instance by the individual defendants to the government.

In summary, both in challenging defendants' right in their individual capacities to oppose the instant motion and in casting inaccurate and unnecessary aspersions on defendants' right to private counsel, plaintiffs continue their pattern of attempting to avoid decision on the merits. First, they have attempted to forestall any judgment on the merits concerning their banking practices by requesting that this Court enjoin the administrative proceedings. Then they attempted to prevent any judgment on the merits of their ill-conceived and unfounded complaints by seeking dismissal without prejudice. Now they seek to avoid decision on the merits of their motion for dismissal by attacking the propriety and character of the individual defendants' representation. Plaintiffs' approach is understandable: to date, the only decision on the merits based on evidence from both sides (i.e., the administrative decision in the [REDACTED] [REDACTED] cease and desist proceedings) dealt plaintiffs a devastating defeat. This Court, however, should give short shrift to plaintiffs' desire to avoid resolution of the merits of this controversy.

II. Plaintiffs Had No Justification For Bringing These Actions.

The Reply (pp. 9-12) attempts to bolster the case for dis-

missal without prejudice by asserting "ample justification" for bringing these actions. The opinion, findings and order of the administrative law judge in the cease and desist proceeding (submitted herewith as Appendix A) totally undermine plaintiffs' assertion.

Specifically, the administrative law judge: (1) rejected plaintiffs' allegations of wrongdoing and malicious intent on the part of the OCC; and (2) found justified all OCC's charges against [redacted] except those related to the level of [redacted] compensation. Every loan classified "substandard" by the OCC was found to be properly so classified.

With regard to plaintiffs' allegations of OCC misconduct, the administrative law judge wrote:

The professional judgment of the national bank examiners in this case was properly exercised in all phases of the examination. The Respondent's attempt to attribute to these examiners some dark and evil although clearly unidentifiable presence which would have these examiners performing their task in an atmosphere totally adverse to the best interest of the banks was frequently hinted at by Respondent throughout these hearings. However, not a scintilla of evidence is discernible from this record that these examiners in the performance of their task of examination in December, 1980 operated in any thing other than a clear, professional atmosphere free of any bias or prejudice against this Respondent. [Appendix A at 65-66]

The administrative law judge found that [redacted] had failed to live up to commitments to the OCC and described the necessity for a cease and desist order in these words:

The road to a Cease and Desist Order in this case had been paved with the broken promises, unfulfilled assurances and inadequate resolutions which paid only lip service to the accepted standards of prudent operation of the Bank in the best interest of not only the Bank but its depositors and the public served in the community. There does not appear to be any other mechanism left than a Cease and Desist Order designed to proscribe this continuous and flagrant disregard for sound principle of banking with adherence to sound standards of conduct and mandating an affirmative action to correct the conditions found in this Bank is,

indeed, imperative and appropriate.
[Appendix A at 78-79; emphasis added.]

* * *

(2) Because of the BANK's past history of violations of laws and rules and its cavalier attitude toward the necessity of complying with laws and rules a Cease and Desist Order should be issued even for violations of law that were inadvertant or subsequently corrected after discovery by the examiners. [Appendix A, at 87, Finding and Conclusion II(2); emphasis added.]

The administrative law judge, like the OCC, was concerned with the conflict of interest [REDACTED] has in, inter alia, both selling and purchasing loan participations on behalf of the [REDACTED] banks:

Of further concern is a lack of clarity in this record whether [REDACTED] acted in the best interest of this Bank or one of the other banks with which he maintained an executive relationship. At best there has been created a conflict of interest which [REDACTED] has been unable to render lending decisions for this Bank and in its best interest.

The consequences of this conflict of interest are apparent in the serious credit weaknesses, evident at the very inception of the credit, which characterizes many of the participations from related banks. [Appendix A at 56; emphasis added.]

In short, plaintiffs' assertion of their "ample justification" for commencing the instant actions can no longer be taken seriously.

Plaintiffs also err in suggesting (Reply at 10) that the OCC refuses to recognize that its examiners may be held liable for improprieties in the conduct of their duties. It is only the use of specious allegations to intimidate that defendants challenge. Also, as regards the instant motion in particular, the OCC objects to the continued use of the threat of litigation over past actions as a means of influencing and intimidating regulatory posture in the future.

In the same vein, plaintiffs totally mischaracterize the "white papers" (DX 60 and DX 75) discussed at length in the Memorandum. Specifically, plaintiffs describe the white papers' reference

to lawsuits, including individual liability actions, as being merely expressions of the "same thought" mentioned by certain of the individual defendants, i.e., that public officials are responsible at law for their negligence (Reply at 10). This argument totally ignores the exhaustive showing in the Memorandum: the white papers reflect plaintiffs' intention to institute these actions, with their allegations of conspiracy and abuse, as a means of intimidating OCC into acquiescing in plaintiffs' dubious banking practices. Most significant in this regard is the fact that the "white papers" were prepared: (1) before any plaintiff had knowledge of the facts which they now allege demonstrate illegal conduct on the part of defendants, and (2) at a time when, according to their own testimony, plaintiffs had no suspicion whatsoever that the OCC would institute cease and desist proceedings - the only means available to the OCC to compel plaintiffs to act in any way against their own will. In short, both the timing and the contents of the "white papers" show that they contain, not [REDACTED] reflections on an abstract principle of law, but rather a battle plan for an attack on regulators who dared question his banking practices.

Plaintiffs also suggest that plaintiff banks' 1981 record earnings (exclusive of legal expenses) demonstrate that temporary cease and desist orders were unwarranted (Reply at 11). This overlooks the fact that - due at least partially to the temporary cease and desist orders and to subsequently negotiated permanent orders signed by [REDACTED] - plaintiff banks have refrained, for most of 1981, from accepting transfers of substandard assets from other [REDACTED] banks. It is illogical to argue that, because OCC's efforts have been successful in preventing plaintiff banks from incurring losses, those efforts were not necessary. Moreover, the cited "record earnings" may well be inflated due to non-recognition of losses which are disguised by "refinancings" or "restructurings" of hopelessly uncollectible debts. As the administrative law judge wrote in the [REDACTED] decision:

This Judge has been alarmed that the potential for loss is so great since these loans were so frequently restructured or refinanced. Thus, the loan has remained in being, its amount has not been reduced, only its character may have been changed. [Appendix A, at 63]

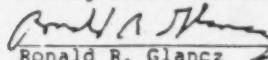
In addition, the earnings may well have been inflated by failure to provide adequate reserves for future losses. [See Appendix A, Order to Cease and Desist, Article XI].

Conclusion

For the reasons stated above and in the Memorandum, plaintiffs should be allowed to dismiss the instant actions only on condition that dismissal be with prejudice, or, in the alternative, on condition that plaintiffs pay defendants' costs and attorneys' fees.^{2/}

Respectfully submitted,

JOHN M. MILLER
Acting Chief Counsel


Ronald R. Glancz
L. Robert Griffin
Donald N. Lamson
Howard N. Cayne

Attorneys for Defendants
Office of the Comptroller
of the Currency
490 L'Enfant Plaza, S.W.
Washington, D.C. 20219

^{2/} Plaintiffs state that in LeCompte v. Mr. Chip, 528 F.2d 601, 605 (5th Cir. 1976), "the court vacated and remanded an award of attorneys' fees precisely because the record was barren of prejudice to defendant." (Reply at 18). This statement is inaccurate. The court below in LeCompte had not granted attorneys' fees, but rather had imposed, as conditions of voluntary dismissal, certain conditions precedent to reinstatement of the litigation. It was specifically because the conditions imposed were not like those "usually found" - the latter expressly including attorneys' fees - that the lower court's order was held appealable. 528 F.2d at 603-4.



AJS:MRichman:jd
145-3-2365

Telephone:
(202) 633-5735

Mr. William K. Slate, II
Clerk, U.S. Court of Appeals
for the Fourth Circuit
Room 402, Post Office Bldg.
Tenth and Main Streets
Richmond, Virginia 23219

Washington, D.C. 20530
March 23, 1982

AGENCY

Dear Mr. Slate:

On March 19, 1982, the district court entered the attached order dismissing the actions underlying these appeals "with prejudice." Accordingly, we respectfully submit that the appropriate action would be for the Court to vacate the district court's decisions of July 2 and August 5, 1981 (the injunctions, findings of fact and conclusions of law), under United States v. Munsingwear, Inc., 340 U.S. 36 (1950). Otherwise, the district court's adverse findings and conclusions, the validity of which we have challenged on appeal, will stand unreviewed and unreviewable.

Enclosed are three copies of this letter and the order for distribution to the Court.

Sincerely,

Anthony J. Steinmeyer, per me
ANTHONY J. STEINMEYER (202) 633-3388

Marc Richman
MARC RICHMAN (202) 633-5735
Attorneys
Civil Division, Room 3617

ORDER

The Court has received a wealth of materials addressing the issues of whether this action may be dismissed without prejudice and whether attorney fees may be awarded. After consideration of all materials on these issues, the Court does hereby ORDER as follows:

1. That this action is dismissed with prejudice.
2. That costs are to be assumed by each party.
3. That the Clerk is directed to remove these actions from the active docket of the Court.

The Clerk is directed to send a certified copy of this Order to counsel of record.

1982 MAR 26 AM 2:48
Federal Home Loan Bank Board



1700 G Street, N.W.
Washington, D.C. 20552
Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

RICHARD T. PRATT
CHAIRMAN

MAR 24 1982

Honorable Charles E. Grassley
Chairman
Subcommittee on Agency
Administration
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing to express my support for S. 1775, a bill designed to treat fairly the significant and growing problem of so-called "constitutional tort" suits filed against federal employees in their individual and personal capacities for actions taken in the course of performing their official duties.

Currently, the Federal Torts Claims Act subjects the government to liability for tort claims based on the negligent or wrongful act or omission of any Government employee while acting within the scope of his office or employment, such liability to be determined "in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. §§ 1346(b), 2672 and 2674. There are some specifically enumerated exceptions to this general grant of torts jurisdiction and liability, such as cases involving discretionary governmental functions. See, 28 U.S.C. § 2680. Although Congress has enacted several specific provisions that make the government the exclusive defendant in certain situations, a plaintiff is generally permitted to sue both the federal employee allegedly responsible for misconduct as well as the United States.

In the 1971 decision of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that Congressional authorization was not required to subject individual federal officials to personal liability for violations of Fourth Amendment rights. As documented by hearings last fall before the Senate Judiciary Subcommittee on Agency Administration on S. 1775, and in hearings before the House Judiciary Subcommittee on Administrative Law and Governmental Relations on the very similar bill, H.R. 24, the Supreme Court and lower federal courts have in the years since Bivens handed down a number of precedents which have encouraged plaintiffs to seek economic relief for "constitutional torts" from individual defendants rather than the Government. These suits initially focused on law enforcement activities. However, recent suits increasingly have arisen out of regulatory or personnel actions taken by federal officials. A good example of this trend was the 1980 United States District Court ruling holding members of the former Civil Service Commission potentially liable under the Fifth Amendment for allegedly disclosing derogatory allegations against a job applicant to another agency without notice and an opportunity to be heard. Doe v. United States Civil Service Commission, 463 F. Supp. 539 (S.D.N.Y. 1980).

The Bank Board has experienced increasing problems as a result of the Bivens decision and its progeny. In the decade since that decision, the number of so-called "constitutional tort" cases filed against individual Board members and senior staff have increased from zero to six pending lawsuits, and currently account for 20% of staff time expended in our Litigation Division. To date, all these suits have involved supervisory decisions by the Bank Board to place institutions in receivership and arrange a merger or sale of assets. In view of the severe earnings crisis in the thrift industry, we have every reason to believe that the problem of constitutional torts suits will continue to grow along with the number of supervisory cases in which similar Bank Board action is required.

From the Bank Board's perspective, allocation of more resources and staff time to such suits is extremely undesirable. The past year was the worst in the history of the thrift industry, with the industry suffering net after-tax losses in 1981 of some \$4.5 billion. In terms of individual associations, our best current estimate is that more than 80% of associations insured by the Federal Savings and Loan Insurance Corporation ("FSLIC") suffered losses last year.

One result of the industry's deteriorating earnings was that the number of merging institutions rose substantially during 1981. Indeed, the number of approved mergers of FSLIC-insured institutions more than doubled, increasing from 139 in 1980 to 294 last year. While the bulk of these were voluntary, slightly more than one-fourth of the mergers approved last year were of a supervisory nature, including 23 requiring financial assistance from the FSLIC. The merger rate may rise at an even faster rate this year, with as many as 250 of a supervisory nature.

At this time, the Bank Board's top priorities are to cope with the immediate earnings crisis of the thrift industry in a manner designed to maintain public confidence in the financial system and to promote the long-run viability of those institutions which are strong enough to weather the current economic conditions. Central to meeting these goals is the defense of suits filed against the Bank Board in its capacity as an arm of the United States government, when such suits challenge important regulations or policies essential to dealing with the crisis. For example, the Bank Board is currently defending a suit which challenges the Bank Board's policy allowing an interstate merger in a supervisory case where such a merger is the least costly solution for the FSLIC.

Due to current budgetary constraints, our legal staff resources and our ability to hire new staff are very limited. And because of the ever-growing litigation case load, the staff is under steadily increasing pressure to meet expanded responsibilities. Any increase in our current responsibilities, such as that likely to occur in the future as a result of more *Bivens*-type suits arising from the projected increase in supervisory mergers, must have a very negative impact on our staff's ability effectively to defend the Board in other litigation matters.

The Bank Board believes that the current spate of *Rivens*-type suits is especially pernicious because all have been filed simultaneously with the suits against the Board and a number are based on legal grounds so dubious as to be frivolous. In short, we believe these suits are not aimed at effecting a recovery, but are being used mainly as a harassment tactic, and as a means of intimidating Board members and senior staff from performing their statutory duty to ensure the safety and soundness of individual institutions by authorizing receiverships and mergers for institutions that are insolvent or in an unsafe or unsound condition.

These suits are effective harassment tools because they result in significant personal hardship for the employee defendants. For example, even the most frivolous suits must be disclosed as creating a contingent liability when the employee completes a standard loan application. Therefore, the mere filing of such a suit can interfere with the employee's credit rating. Our experience regarding the frivolousness of these suits is borne out by the Department of Justice's estimate that of several thousand constitutional torts suits filed to date, only a handful have resulted in a judgment against federal employees.

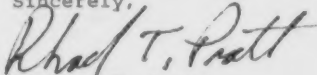
The provisions of S. 1775 would ameliorate these problems and provide fairer treatment for those individuals who may have meritorious claims against government agencies, and individuals acting for those agencies. S. 1775 would amend the FTCA to make the Government the exclusive defendant in all common law tort actions in which the Attorney General certifies that the employee was acting within the scope of his employment. In addition, for the first time, the United States could be sued under the FTCA for a *Bivens*-type "constitutional tort." The exclusive remedy in such a case would also be against the United States. The provisions of S. 1775 would also retain the

qualified immunity defense and such other immunity defenses as have been recognized by the courts in the *Bivens* actions as available to an individual employee. The continued availability of such defenses will, in our opinion, advance the public interest by permitting disproof of the merits of the claim by testing the acts of challenged officials against the standard of reasonableness and good faith. The presence of these defenses also makes sound economic sense, since S. 1775 makes provision for liquidated damages in the event of proof of a constitutional tort. Finally, providing the good faith defense will prevent a chilling effect on the conduct of public officials where the law may be uncertain. Because areas of legal certainty are diminishing, providing such a good faith defense is vital to encourage progressive and enlightened policies in the numerous areas where the law is unfolding or equivocal. The Bank Board is especially sensitive to this concern, as it seeks new and innovative approaches to ameliorate the problems of the thrift industry.

We also believe that the provisions of S. 1775 are more beneficial to potential plaintiffs than current law, as it is extremely difficult for a plaintiff to prove actual damages even if he establishes that a constitutional tort has occurred, and Government employees ordinarily would be unable to pay. By making the United States the defendant in constitutional tort cases, S. 1775 ensures that plaintiffs with valid claims will have a certain recovery where damages are awarded.

Therefore, as I stated before, the Bank Board strongly supports the goals of S. 1775. I trust these comments have been helpful to you. Please note that, in accordance with 12 U.S.C. § 250, this letter has not been reviewed outside the Federal Home Loan Bank Board, and does not necessarily reflect the views of the President.

Sincerely,



Richard T. Pratt
Chairman

cc: Hon. Paul Laxalt
Hon. Arlen Specter
Hon. Howard M. Metzenbaum
Hon. Max Baucus



Federal Bar Association

March 29, 1982

Hon. Strom Thurmond
Chairman, Committee on the Judiciary
2226 Dirksen Senate Office Building
United States Senate
Washington, D. C. 20510

Dear Senator Thurmond,

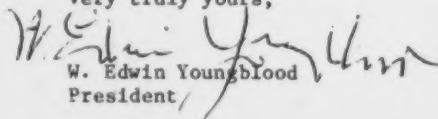
On March 27, 1982, the National Council of the Federal Bar Association approved the enclosed resolution endorsing legislation to amend the Federal Tort Claims Act by making the United States the exclusive defendant for tortious conduct of federal employees in the course of their employment. I have also enclosed our summary report on the resolution.

The Federal Bar Association is composed of 15,000 attorneys presently or formerly retained by the United States or who have demonstrated a substantial practice before the federal courts or administrative agencies. Our Members represent all forms of government and private practice and, under the Federal Tort Claims Act, frequently oppose each other in the federal courts.

It is our concerted opinion that the best interests of the United States, its employees and private plaintiffs are served by making the United States the exclusive defendant in FTCA litigation. The determination by the Attorney General that an employee was acting within the scope of his or her employment, and not on a detour and frolic, will simplify the determination of proper representation. In such cases, the employee will be relieved of the expense and oppression of defending the suit. The United States will retain its rights to administratively discipline the employee, where appropriate. Where the suit is justly brought, a plaintiff will be able to recover damages against the United States, which, in most cases, could not be collected from the employee. Accordingly, we support the principles embodied in the legislation currently before Congress.

We would appreciate notification of any future hearings on this subject and an opportunity to testify or submit further written comments for the record.

Very truly yours,


W. Edwin Youngblood
President

ATTACHMENTS.



Federal Bar Association

RESOLUTION NUMBER 82-

WHEREAS, there is no general provision for the indemnification of sued federal employees for actions taken within the scope of their employment; and

WHEREAS, federal employees are not shielded from personal liability for their official acts; and

WHEREAS, current case law has broadened the exposure of federal employees to personal damage liability; and

WHEREAS, the existing law of government and employee tort liability is inconsistent in that government lawyers can be sued individually for malpractice when they represent individuals while, for example, most government doctors have immunity from such suit; and

WHEREAS, the threat of personal lawsuits against federal employees has a chilling effect and may hamper the diligent action of individual federal officials;

THEREFORE BE IT RESOLVED, that the Federal Bar Association strongly supports efforts now being undertaken in Congress to improve the current law on official liability by amending the Federal Tort Claims Act to make the United States the exclusive defendant in actions where a federal employee is acting within the scope of his or her employment and to provide that the remedy for such violations include compensatory as well as actual damages;

FURTHER RESOLVED, that the President of the Federal Bar Association is authorized to (1) transmit this resolution to appropriate officials of the Executive and Legislative branches of the Federal Government and (2) testify before Congressional Committees on behalf of legislation achieving this goal or designate an appropriate official of the Federal Bar Association to do so.

Adopted by the National Council:

3/27, 1982

W. Edwin Youngblood
 W. Edwin Youngblood
 President



Federal Bar Association

Report

An ever increasing number of lawsuits are being filed seeking personal damages against government employees acting in their official capacity.

Although the Federal Tort Claims Act makes the government liable for tort claims based on the negligent or wrongful acts of government employees while acting within the scope of their employment, cases involving discretionary governmental functions are not covered. The Department of Justice estimates that at the present time there are 2,200 lawsuits pending against federal employees in their individual capacity. This does not include suits which may have been filed against agencies with independent litigating authority. Most of these lawsuits involve more than one defendant; in a number of suits as many as 30 to 45 individuals are being sued. Therefore, the actual number of federal employees presently being sued is between 7,500 and 10,000.

Since the 1971 decision of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388 (1971), the number of lawsuits attempting to seek redress directly against the individual employees' personal resources has increased tremendously. Initially, *Bivens* suits were primarily filed as a result of incidents involving law enforcement activities. In recent years, however, regulatory actions or personnel actions taken by federal employees have been the basis for filing most of the lawsuits.

These suits have a detrimental effect, not only because they subject an individual to the prospect of immense financial loss but also because they create an atmosphere which hampers diligent action on the part of individual government officials. Rational decision-making is jeopardized by fear that a lawsuit will be brought against the decision maker.

Under the legislative proposals now before Congress, S. 1775 and H.R. 24, the United States would be the exclusive permissible defendant. The bills provide a remedy for wrongdoing by waiving sovereign immunity and making the United States liable for actions taken by federal employees acting within the scope of their employment. Where an act is beyond the scope of employment, the individual employee would not be immune from personal liability.

In addition H.R. 24 provides the triggering of a disciplinary procedure whereby the Attorney General, after judgment against the United States, forwards the matter for administrative investigation or disciplinary action to the head of the agency which employed the official at the time of the act or omission.

Because neither of the current bills provides for the inclusion of compensatory damages and because the Tort Law Committee in 1974 specifically testified in favor of including compensatory damages, a provision has been included favoring the inclusion of compensatory damages in the legislation.



DEPARTMENT OF THE TREASURY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20220

Dear Senator Grassley:

APR 8 1982

On December 2, 1981, Peter Wallison, General Counsel for the Treasury Department, submitted a statement to your subcommittee on S. 1775, a bill to make the United States the exclusive defendant in all common law and constitutional tort suits arising out of actions or omissions of Government employees acting within the scope of their employment. I am writing to you to update two of the most significant cases mentioned in this statement which exemplified the anguish of Federal employees over threatened personal liability and the use of Bivens-type suits to interfere with ongoing enforcement proceedings.

Let me also take this opportunity to respond to the issue raised in discussions between our staffs regarding the Government's ability, absent personal liability, to deter tortious conduct through administrative disciplinary action.

A. UPDATE ON DECEMBER 2nd STATEMENT

1. Epps v. United States. On page 5 of the December 2nd statement we cited a few examples of the many instances in which employees of the agencies and bureaus of the Treasury Department have been subjected to the personal hardship and anguish of prolonged Bivens-type litigation. In particular, we discussed Epps v. United States, et al., C.A. No. J-78-2373 (D. Md. 1981) wherein:

. . . the plaintiff sued the United States under the Federal Tort Claims Act and ten Baltimore District IRS officers under Bivens. The plaintiff alleged that during the period in which the IRS was in possession of her business, the property was vandalized. The count against the United States was dismissed because it fell within the exception to the Federal Tort Claims Act for matters arising from the assessment and collection of a tax. 28 U.S.C. 2680(c). The Bivens action against the IRS officers in the amount of \$2.1 million, however, survived numerous motions for summary judgment. The complaint was dismissed as to seven of the IRS defendants prior to trial, and as to an eighth after the submission of evidence. The jury acquitted one and found the last, Field Branch Chief Baer, personally liable in the amount of \$200,000. . . .

The Department of Justice filed a post-trial motion in this case on November 13, 1981, asking for the judgment to be set aside and a judgment n.o.v. entered in favor of defendant Baer. In the alternative, the Justice Department moved for a new trial. Justice alleged that the judge erred in denying defendant Baer the right to introduce evidence regarding the nature and purpose of meetings between himself and attorneys from the Justice Department. Justice also argued that there was no evidence of a constitutional violation.

On March 15, 1982, the trial judge granted defendant Baer's motion that the judgment be set aside and a judgment n.o.v. be entered on his behalf. The judge based her decision primarily upon the fact that the defendant relied upon the advice of counsel as to the propriety of his actions. This decision

overturns the only judgment of which we are aware against an IRS employee pursuant to Bivens.

* * *

2. Comptroller of the Currency Litigation. On page 6 of the December 2nd statement we drew your attention to Bivens-type suits which directly interfere with ongoing enforcement proceedings. In particular:

Individual liability suits brought recently by several banks and individuals have delayed, obfuscated and interfered with the administrative enforcement functions of the Office of the Comptroller of the Currency. Examinations of several affiliated banks in one eastern state revealed practices that, under the Comptroller's policies and procedures, warranted the institution of formal enforcement cease-and-desist proceedings pursuant to 12 U.S.C. § 1818. The Comptroller commenced the appropriate proceedings by issuing Notices of Charges, charging the banks with unsafe or unsound banking practices and other violations of law. The Comptroller simultaneously issued Temporary Orders to Cease and Desist to restrain the banks from taking certain actions during the pendency of the enforcement proceedings. Exercising statutory rights under 12 U.S.C. § 1818(c), the banks (as well as other named plaintiffs) filed suit in federal district court for an injunction setting aside the Temporary Orders.

These complaints were then amended to add Bivens-type claims against every official in the Comptroller's office who had played any part in the preparation or approval of the enforcement proceedings. The theory of the amended complaints was that the named employees, acting in concert, had deprived the plaintiffs of Fifth Amendment property rights and Fourth Amendment privacy rights. The Comptroller is now faced with the complex task of proceeding with the enforcement proceeding while simultaneously defending against the Bivens complaints filed in the proceeding.

After extensive pretrial discovery against the Comptroller, the plaintiffs in this case filed a Motion to Dismiss. The Comptroller opposed this motion unless the action was dismissed with prejudice. The attached Opposition to Plaintiff's Motion to Dismiss amply describes the bad faith of the plaintiffs in pursuing these claims as well as the attendant toll on the Government's resources wasted in opposing them. (Since the original enforcement proceeding is still being pursued, identifying information has been deleted from the documents attached). On March 19, 1982, the Federal district court hearing this case dismissed plaintiffs' action with prejudice. However, we understand the plaintiffs will seek a rehearing on this case.

* * *

These two cases exemplify several points that have been raised by almost every supporter of S. 1775:

First, here are two more constitutional tort cases that have been ultimately repudiated. The figures are staggering; Federal employees have been subjected to literally thousands of Bivens-type accusations, of which fewer than ten have survived. Such an inconsequential number of vindicated plaintiffs clearly suggests that this judicial remedy is not fulfilling its intended function.

Second, here are two more constitutional tort cases that have subjected at least twenty Federal employees to the threat of financial ruin. Once again we have allowed our civil servants to be subjected to interminable periods of financial uncertainty; their ability to plan ahead for their families' wellbeing, for their children's education, or for their retirement has been compromised. There is no way to judge in quantitative terms the damage such suits have caused to Federal employees' families any more than there is a way to quantify the value of constitutional rights -- but that makes the damage no less real. Perhaps such damage could be tolerated when balanced against the constitutional rights which were protected. But the statistics bear out, and these two cases illustrate, that such is not the case as courts decide time and time again that there has been no constitutional violation. The true victims in Bivens cases are our civil servants and their families.

Third, here are two more constitutional tort cases that have contributed to the drain on Government resources. In a time of diminishing Government resources, we have diverted time, money, and skilled manpower away from implementing Congressional programs and enforcing federal laws to defending the officials responsible for maintaining these programs. This is especially unfortunate when Bivens allegations turn out to be litigation ploys of plaintiffs who already are defendants in other Government proceedings. We are allowing a judicial remedy -- designed to protect cherished constitutional rights -- to be perverted into an easy way to harass Federal employees and intimidate law enforcement proceedings.

B. TREASURY ADMINISTRATIVE DISCIPLINARY ACTION

I would like to describe briefly Treasury's internal disciplinary mechanism and to allay any concerns that the Government will not provide vigorous administrative oversight and disciplinary action.

The Inspector General for the Treasury Department has jurisdiction over all Treasury agencies as well as the Office of the Secretary. In addition, each of Treasury's law enforcement agencies -- ATF, Customs, IRS, Secret Service -- has its own office of internal affairs under the Inspector General's oversight. Consequently, there are two layers of internal investigation which monitor agency activities and to which complainants can appeal. Such investigations have resulted in a spectrum of disciplinary action, ranging from reprimands to suspensions to dismissals. Complainants also make allegations to the Department of Justice, the United States Attorney, or to judges and magistrates; these complaints are often referred back to the Department for investigation. When investigatory findings so warrant, these offices refer cases to the United States Attorney or the Department of Justice for prosecutorial review.

* * *

Even if we were to assume that existing administrative disciplinary activities are inadequate, we do not understand how critics can argue that S. 1775 will not provide the additional disciplinary incentive necessary to assure that violators will be reprimanded. S. 1775 guarantees that a complainant can have his day in court and that the United States can be held liable for the constitutional torts of its employees. Under S. 1775, the plaintiff's claim against the United States will result in an independent judicial determination as to (1) the existence of a constitutional right violation and (2) the presence of any "good faith" defense. If a court finds no "good faith" defense

present, this will spotlight the employee's misconduct and make it extremely difficult for the agency to avoid disciplining him. Because presence of the "good faith" defense is determined by the court, there is no way the agency can gloss over the violation; it must either take appropriate action or be subjected to public scrutiny and Congressional reaction.

In a nutshell, the net effect of S. 1775 will be to make the Federal employee accountable to administrative disciplinary action, rather than financial liability. Such disciplinary action, as it is presently exercised, results in punishment ranging from oral reprimand to suspension without pay to removal from employment. One simply cannot say that losing your job is an insignificant incentive to safeguard the constitutional rights of private citizens or fellow employees. We believe this realignment of sanctions is justified by the record of too few legitimate plaintiffs and too many abuses of the judicial remedy created in Bivens.

We cannot understand critics of S. 1775 who demand either the personal liability of the employee, or the "deep pocket" liability of the United States without any "good faith" defense. While personal liability arguably deters unconstitutional behavior, turning the Government into a no-fault insurer can in no way be construed as discouraging employees from committing such acts. Removing the "good faith" defense obliterates any independent judicial determination as to the propriety of the employee's behavior; the judicial function, as well as the disciplinary function, are then left to the agency -- an incongruous result for those who are most suspicious of the Government's ability to police itself. We see no justification for excluding our Federal courts from determining under what circumstances individuals who are constitutionally injured are to be recompensed. S. 1775 would not alter this traditional judicial function; it would merely substitute the United States as the defendant liable for providing compensation.

I hope this further information will be of assistance to you. Let me again express the Department's strong support for S. 1775.

Sincerely,

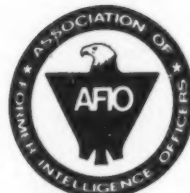
Margery Waxman
Margery Waxman
Deputy General Counsel

The Honorable
Charles E. Grassley, Chairman
Subcommittee on Agency Administration
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Enclosures.

Association of Former Intelligence Officers

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30 April 1982

The Honorable Charles E. Grassley
Chairman, Subcommittee on Agency Administration
of the Committee on the Judiciary
United States Senate
Room 4B, RSOB
Washington, DC 20510

Dear Mr. Chairman:

After consultation with the staff of your committee, this letter is submitted in support of S-1775 to assist you in your deliberations.

The Association of Former Intelligence Officers (AFIO) was founded on a belief that a responsive and efficient American intelligence service is vital to the security of the Nation. During the decade of the 70's, a combination of events resulted in the debasement of America's entire intelligence network. Some of these events were specifically designed to weaken the country's intelligence line of defense. Others had the effect of doing so without so intending.

Among occurrences falling within the latter category was the 1971 Supreme Court decision in the Bivens vs. Six Unknown Federal Narcotics Agents (403 US 388). Here, the Court decreed that Government employees can be held personally liable for money damages for acts which allegedly violate someone's constitutional rights, even though the acts were taken in the course of the Government employees' attempts to perform their duties.

Since the Bivens decision, literally thousands of Government employees have been named as defendants in constitutional tort actions. Department of Justice estimates put the figure at between 7,500 and 10,000. The fact that only thirteen employees have had money judgments entered against them indicates the vindictive nature of most of the actions instituted. The most notable result of such actions has been the chilling effect they have had on the operations of various Federal agencies, particularly those

concerned with intelligence and law-enforcement matters. In the summer of 1975, the Attorney General, Edward M. Levi, refused to defend Government employees who were defendants in mail-opening suits.

Suing intelligence personnel in their individual, rather than official, capacities is most intimidating to them. The sued employee cannot help but worry about the possibility he may be held personally liable for heavy monetary damages. This causes him to be overly cautious in discharging assigned tasks, to avoid any action which might make him liable to additional suits. Not only does his own performance suffer, but those not sued, fearful they may be, react in a similar manner. These circumstances have resulted in a decline in agency morale and efficiency.

This is not mere conjecture. Last year a trial was held in New York City of a case in which the Socialist Workers Party (SWP) claimed \$40 million damages on behalf of itself and several of its members for alleged violations of constitutional rights by the FBI, CIA and other Federal agencies. An FBI agent testified that, even before the FBI had to halt its investigation of the SWP because of guidelines issued by former Attorney General Levi, it was doing less investigation of the organization because "the Agents don't want to be put in a position where they are accused of harassment or something of that nature."

Perhaps an indication of the real basis for the plaintiffs' action was given in the SWP publication "Militant" when, on the basis of this testimony, it later reported that the suit had succeeded in "diminishing the G-men's zeal."

Former Attorney General Griffin Bell wrote, in mid-1978, "Sincere Government employees now are inhibited in the performance of duties essential to the Nation by the threat of vindictive lawsuits." During Congressional testimony that same year, he said that, if somebody takes a job and makes a career as an FBI agent and is then sued, "it is a difficult situation when his own Government turns on him in the sense that they don't stand behind him."

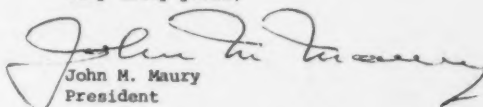
Suits of the above nature have been filed not only against FBI agents. In a May 1977 report, the General Accounting Office listed 199 suits filed against personnel of eleven departments and agencies of the Federal Government, including CIA, Defense, State Department and the White House.

With the more recent spate of such suits, quality personnel to fill Federal positions will soon become difficult to acquire if they may be held liable for constitutional violations committed while carrying out apparently valid orders in good faith and in a normal, routine fashion.

For this reason, and in keeping with the belief upon which it was founded, AFIO favors legislation which will preserve the right to sue on the part of an individual who feels he has been wronged by the actions of a Federal employee but at the same time remove the motivation for actions of a vindictive nature or those designed primarily to restrain Government agencies from carrying out their responsibilities, particularly in those areas of intelligence and law enforcement so vital to the security of the Nation and the safety of its citizenry.

Accordingly, on behalf of our Association I write in support of S-1775, a bill under consideration in the Subcommittee on Agency Administration, which would change the defendant in so-called constitutional tort actions from the Government employee to the Government itself. Under this legislative proposal, the United States would be the exclusive permissible defendant and it would permit the Government to take disciplinary action against the employee, if appropriate. It is our firm belief such legislation will curtail and possibly eliminate entirely frivolous and vindictive actions and strengthen our Nation at a time when hostile intelligence efforts and both domestic and international terrorist activity present a formidable threat to our security.

Very truly yours,


John M. Maury
President

JMM/ahb